NO. 92-1127

Supreme Court, U.S.
FILED
DEC 22 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

JOHN R. HELTON, JEFF L. HIRZEL,
JAMES W. LITTLE, PHILIP E. SNODDY,
MARVIN L. WYNN,
Each, Individually and as a partner of
Sooner Vista, a partnership,

PETITIONERS,

v.

F.D.I.C., Receiver for Victor
Savings and Loan Association,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS, DIVISION 4,
STATE OF OKLAHOMA

APPENDIX A
VOLUME I

R. M. HELTON
Counsel for Petitioners
713 Lamar Street
Wichita Falls, Texas 76301
Tel. 817-723-0729, 817-766-2828

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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APPENDIX A

ITEM #1

IN THE DISTRICT COURT OF DELAWARE COUNTY
STATE OF OKLAHOMA

FILED
MAR 15 1989

VICTOR SAVINGS AND LOAN ASSOCIATION,	)	
Plaintiff,	)	
vs.	)	No. C-85-371
SOONER VISTA, (a/k/a Sooner Vista Partnership) an Oklahoma general partnership; MIKE BARNETT, (individually, and as partner of Sooner Vista); JIM H. BIFFLE, (individually and as partner of Sooner Vista); JOHN R. HELTON (individually and as partner of Sooner Vista); JEFF L. HIRZEL (individually and as partner of Sooner Vista); JAMES W. LITTLE (individually and as partner of Sooner Vista); KENNETH E. MILLER (individually and as partner of Sooner Vista); PHILLIP E. SNODDY (individually and as partner of Sooner Vista) MARVIN L. WYNN (individually and as partner of Sooner Vista); JOHN STEPHEN HOPE (individually and as partner of Sooner Vista);	)	

COUNTY TREASURER OF DELAWARE COUNTY: BOARD OF COUNTY COMMIS SIONERS OF DELAWARE COUNTY: AND CHARLES J. DAVIS,

Defendants.

AMENDED PETITION

COMES NOW the Federal Savings and Loan Insurance Corporation ("FSLIC") in its capacity as receiver of Plaintiff Victor Savings & Loan Association ("Victor") and for its amended petition alleges the following:

1. On May 13, 1983, Defendant Sooner Vista a/k/a Sooner Vista Partnership ("Sooner") was a general partnership formed pursuant to the laws of Oklahoma. On that date:

Defendant Mike Barnett ("Barnett")
Defendant Jim H. Biffle ("Biffle")
Defendant John R. Helton ("Helton")
Defendant Jeff L. Hirzel ("Hirzel")
Defendant James W. Little ("Little")
Defendant Kenneth E. Miller ("Miller")
Defendant Phillip E. Snoddy ("Snoddy")
Defendant Marvin L. Wynn ("Wynn")

collectively "the partners" and Royce M. Hammons were partners in the partnership.

2. On May 13, 1983, Victor Federal Savings & Loan Association, a federal chartered savings and loan association, ("Victor Federal") made a loan to Sooner in the principal amount of $214,200.00 plus closing costs of $3,643.21. Sooner used the loan proceeds to purchase a condominium, Suite 1010 in Sooner Vista Towers at Grand Lake. In consideration of the loan, Sooner executed and delivered to Victor Federal a note in the principal amount of $217,843.21. A copy of the note is attached hereto as Exhibit A.

3. On May 13, 1983 and in conjunction with the execution and delivery of the note, Sooner executed and delivered to Victor Federal a mortgage on the following property:

> Unit 1010 of Shangri-La Vista Towers, a unit ownership estate according to the recorded declaration and plan thereof, and an undivided 1.10% interest in and to the common elements and appourtenances thereto belonging, all according to and more particularly described and shown in the Declaration of Unit Ownership Estate and By-Laws of Shangri-La Vista Towers, recorded January 12, 1981, in Book 410, Pages 138-163, inclusive, in the Office of the County Clerk, Delaware County, Oklahoma.

("the property.") The mortgage tax was paid and the mortgage was recorded on May 17, 1983 in Book 447 at Page 587 in the records of the County Clerk of Delaware County, Oklahoma. A copy of the mortgage is attached hereto as Exhibit B.

4. On May 13, 1983 and in consideration of Victor Federal's loan to Sooner, the partners executed and delivered to Victor Federal written guaranty agreements,

each of which unconditionally guaranteed payment of "10% (plus closing costs estimated at $5,000) of the original loan to Sooner of $214,200.00. Closing costs on the loan totalled $3,643.21. Copies of the guaranties are attached hereto as Exhibit C-1 through C-8.

5. As a result of scrivener's error, the guaranties referred to in paragraph 4 above, while intended by Victor Federal and the partners to guarantee the indebtedness of Sooner, as debtor, to Victor Federal, instead list the various partners as the "debtors" on the guaranties. The scrivener's error should be corrected and the guaranties reformed to reflect that the "debtor" referred to in the guaranties is Sooner Vista and reformation should be ordered by reason of the scrivener's error and mutual mistake of the parties.

6. On March 13, 1985, the note was in default. On that date, Sooner executed and delivered to Victor Federal an adjustable rate note which incorporated the balance of Sooner's indebtedness for the original loan of $214,200 plus closing costs ("the revised note"). A copy of the revised note is attached hereto as Exhibit D. The maturity date of the revised note was May 1, 1986. The revised note was secured by the mortgage.

7. On March 13, 1985, and in consideration of Victor Federal's forbearance from filing suit upon the note and its willingness to accept the revised note, Defendant John Stephen Hope ("Hope") executed and delivered to Victor Federal a written guaranty agreement which guaranteed 10% of loan #20-018499-6, with a balance of $217,313.04 as of March 13, 1985, of the original loan of $214,200 dated May 13, 1983 on the property. A copy of Hope's guaranty is attached hereto as Exhibit E.

8. In August, 1985, Sooner defaulted on the revised note. On September 16, 1985, Sooner, Hope and the partners were sent a demand letter. The default was not cured and the revised note was accelerated on October 16, 1985.

9. On March 13, 1987, the Federal Home Loan Bank Board ("Bank Board") placed Victor Federal into receivership with the FSLIC acting as receiver. On the same date, the assets of Victor Federal, including the note, mortgage, guaranties and revised note involved in this case, were transferred to Victor Savings & Loan Association, a federal savings and loan association ("Victor").

10. On July 28, 1988, the Bank Board placed Victor into receivership with the FSLIC acting as receiver.

11. The following amounts are now owed pursuant to the revised note and mortgage:

Principal	$228,205.04
Interest through November 18, 1988	$ 60,752.46
Interest from November 19, 1988	$ 49.92 per day
Late charges through November 18, 1988	$ 3,422.40
Abstracting expenses	$ 50.00
Maintenance expenses	$ 1,912.43

FIRST CLAIM FOR RELIEF
(NOTE)

12. Plaintiff incorporates the preceding allegations into this First Claim for Relief.

13. Sooner owes to Plaintiff the amounts alleged in Paragraph 16 and, if Sooner assets are insufficient to satisfy the judgment against Sooner, Hope and the partners owe the residual amount.

WHEREFORE, Plaintiff prays for judgment against Defendant Sooner Vista (a/k/a Sooner Vista Partnership), an Oklahoma partnership, for the amounts alleged herein and for judgment against Hope and the partners for any amount of that judgment against Sooner which its assets cannot discharge.

SECOND CLAIM FOR RELIEF
(MORTGAGE FORECLOSURE)

14. Plaintiff incorporates the preceding allegations into this Second Claim for Relief.

15. Defendants have defaulted according to the terms of the mortgage and Plaintiff is entitled to have the mortgage foreclosed and the property sold and the proceeds applied to the mortgage indebtedness.

16. Defendant Shangri-La Vista Towers Homeowners Association ("Homeowners Association") claims some interest in the property by reason of a vendor's lien in the amount of $11,333.79, which was recorded on December 6, 1985, in Book 495 at Page 731, of the records of the County Clerk of Delaware County, Oklahoma. The Homeowners Association should be re-

quired to assert in this action their interests in the property.

17. The Defendants, the County Treasurer of Delaware County (the "Treasurer") and the Board of County Commissioners (the "Commissioners") claim some interest in the Property by reason of unpaid ad valorem taxes for the years 1983 to the present.

18. The Defendant Charles J. Davis is, or may be claiming some right, title or interest in the property by reason of a purported mortgage or lien claimed by Davis.

WHEREFORE, Plaintiff prays for a judgment foreclosing the mortgage, declaring it to be a valid first lien against the property and ordering, in the event that the mortgage indebtedness remains unpaid, that the property be sold and the indebtedness satisfied from the proceeds of sale.

THIRD CLAIM FOR RELIEF
(REFORMATION OF GUARANTIES)

19. Plaintiff incorporates the preceding allegations into this Third Claim for Relief.

WHEREFORE, Plaintiff prays that the guaranties be reformed to reflect that the "debtor" referred to in the guaranties is Sooner Vista.

THIRD CLAIM FOR RELIEF
(GUARANTIES)

20. Plaintiff incorporates the preceding allegations into this Third Claim for Relief.

21. Hope and the partners have failed to pay the amounts owed to Victor.

WHEREFORE, Plaintiff prays for judgment against Hope and the partners to the full extent of their liability pursuant to their respective guaranties.

On all claims for relief, Plaintiff prays for costs, attorneys fees and any other relief to which it may be entitled.

Respectfully submittted,

SNEED, LANG, ADAMS,
HAMILTON & BARNETT

By /s/ Kevin C. Leitch

Kevin C. Leitch O.B.A. #5366
Mark L. Collier O.B.A. #013260
2300 Williams Center Tower II
Two West Second Street
Tulsa, Oklahoma 74103
(918) 583-3145

Attorneys for FSLIC in its
Capacity as Receiver for Victor

FOR VALUE RECEIVED, The undersigned promises to pay to Victor Federal Savings and Loan Association, A Corporation, or order, the principal sum of Two hundred seventeen thousand eight hundred forty-three & 21/100—Dollars ($ 217,843.21), with interest from date at the rate of thirteen 15/100 per centum ($13.15) per annum on the unpaid balance until paid. The said principal and interest shall be payable at the office of Victor Federal Savings and Loan Association, in Muslogue, Oklahoma, or at such other place as holder hereof may designate in writing delivered or mailed to the debtor, in 35 equal monthly installments of Two Thousand four hundred thirty-five & 35/100—Dollars ($2,435.35), commencing on the first day of June, 1963, and continuing on the first day of each month thereafter for 35 months, with the entire principal balance due, and interest on the first day of the 36th month, that is on May 1st, 1988. It is agreed that the payments reflect ón amortization over a 360 month period, and the principal balance due on the 36th month shall be determined accordingly.

If any deficiency in the payment of any installment under this note is not made good prior to the due date of the next such installment, the entire principal sum and accrued interest shall at once become due and payable without notice at the option of the holder of this note. Failure to exercise this option shall not constitute a waiver of the right to exercise the same in the event of any subsequent default. In the event of any default in the payment of this note and if the same is collected by an attorney of law, the undersigned agrees to pay all costs of collection, including an attorney's fee of fifteen per centum (15%) of the amount then insing on the note.

This note is secured by mortgage of even date executed by the undersigned on certain property described

therein and represents money actually used for the acquistion of said property or the improvements thereon.

The undersigned severally waive demand, protest and notice of demand, protest and nonpayment.

Sooner Vista Partnership

/s/ Jim H. Biffle
Jim Biffle, Partner

Unit 1010 Shangri-La-
Vista Towers

_____

EXHIBIT A

$217,843,21.

A-11

REAL ESTATE MORTGAGE

447 - 557

THIS INDENTURE, made this 13 day of May 1983. between Sooner Vista Partnership State of Oklahoma. Party of the first part (hereinafter referred to as Party of the First Part, whether one or all) and VICTOR FEDERAL SAVINGS AND LOAN ASSOCIATION, a Corporation, of Muskogee, Oklahoma, Party of the Second Part, its successors or assigns.

WITNESSETH; That the said party of the first part for and in consideration of the sum of Two hundred seventeen thousand eight hundred forty three and 21/100 Dollars ($217,843.21) in hand paid, receipt of which is hereby acknowledged, by these presents Grants, Bargain, Sell, Convey, and Mortgage unto the party of the second part, the following described real estate, situated in Deleware County, State of Oklahoma, to-wit:

Unit 1010 of Shangri-La Vista Towers, a unit-ownership estate according to the record declaration and plan thereof, and an undivided 1.10% interest in and to the common elements and appurtenances thereto belonging, all according to and more particularly described and shown in the Declaration of Unit Ownership Estate and By-Laws of Shangri-La Vista Towers, recorded January 12, 1981, in Book 410, pages 138-163, inclusive, in the official County Clerk, Delaware County, Oklahoma.

Filed May 17, 1983

together with all the improvements that was made thereto belonging and warrant the title to the same.

EXHIBIT B

This mortgage is given for the purpose of securing the payment of a certain monthly payment note of even date herewith, representing a loan by party of the second part to party of the first part and to accure payment of any extension thereof, said note is by reference made a part hereof. Said Note is due and payable in three (3) full years from date hereof.

Failure to make any payment when due or any breach of the other provision hereof shall make the entire principal sum and accrued interest due and payable at once without notice at the option of the holder of this note and mortgage and collection thereof enforced by foreclosure of this mortgage, and failure to exercise this option shall not constitute a waiver of the right to exercise the same in the event of any subsequent default and the party of the second part, or its successors or assigns, may at its option pay such taces, assessments, or any other legal lien thereon, or insurance premiums, or make repairs; and the sum or sums so paid with interest thereon at the rate of fifteen percent per annum from the date of said payment by party of the second part, shall constitute a lien upon said premiums accured by and collectible under this mortgage and be grounds for foreclosure. The party of the second part may collect a "late charge" not to exceed an amount equal to five percent (5%) of any installment which is not paid within fifteen (15) days from the due date thereof to cover the extra expense involved in handling delinquent payments.

Party of the first part shall not permit any liens for taxes, assessments, improvements or repairs against this property and shall keep said property and improvements thereon in good repair.

Party of the first part shall keep all improvements on said property insured against any loss or damage in peace or in war in the amount of the total indebtedness in companies acceptable to party of the second part, and shall deliver said polities to the party of the second part with loss payable clauses executed in favor of the party of the second part, who shall have authority to make proof of loss the under, and in event of foreclosure or transfer of title to settle the debt herein, title to all said policies shall vest in party of the second part.

Party of the first part agrees to pay each month one-twelfth (1/12th of the sums necessary to pay taxes, special assessments and all insurance premiums for each current year and hereby authorizes the party of the second part at its option, to use such sums for payment of such taxes, special assessments and/or insurance premiums using its judgment as to dates and other payment thereof.

Any sale or transfer of the premisses herein mortgaged without concent of the party of the second part or any failure to make any of the hereby certified payments shall render the unpaid balance of the indebtedness, interest, payments and costs as herein provided and excuted hereby due and collectable, at the option of the party of the second part.

In case of foreclosure of this Mortgage, and/or the turning over of this mortgage to an attorney for collection, and as often as any proceeding shall be taken to foreclosures same as herein provided, the party of the second part shall immediately be entitled to recover an attorney's fee of fifteen percent of the total amount then due, in addition to all other legal costs in the action, including total amount then due, in addition to all other legal costs in the action, including the cost of procuring or completing

an abstract of title to said property, which shall be an additional lien accured by and collectable under this mortgage.

Appraisement of said premises is waived or not at the option of the party of the second part.

As additional security for the payment of said indebtedness, the party of the first part hereby assigns and transfers all rentals, insures, profits and income from the above premises to the party of the second part in cae of default as provided in said note and mortgage, hereby authorizing the party of the second part to receive and collect such rents and credit the amounts collected, less expenses of collexting, upon said total indebtedness, and does consent hereby to the appointment of receiver to collect same in case foreclosure is commenced hereunder.

The granting of any extension or extensions of time of payment of said note, either to the maker or to any other person, or the taking of other or additional security for payment thereof, or the waiver of or failure to exercise any right to mature the whole debt under any convenant or stipulation herein contained, shall not in anywise affect this mortgage nor the rights of the said party of the second part hereunder, nor operate as a release from any personnal liability upon said note nor any convenant or stipulation herein contained.

In the event the Mortgagor obtains further advances from the Association pending the repayment of the note above mentioned, the sum so advanced shall be added to the principal amount remaining due on the original note and repaid as hereinabove provided, ar as agreed upon, and it is expressly agreed that this mortgage shall likewise secure any future sums so advanced by the Association to the Mortgagor.

All Covenants and conditions herein shall be binding on the party of the first part and said first party's heirs, executors, administrators, successors and assigns.

IN WITNESS WHEREOF, the party of the first part has hereunto ser his hand and seal this 13th day of May, 1983.

SEAL

/s/ Jim H. Biffle

Jim Biffle, partner
Sooner Vista Partnership

STATE OF OKLAHOMA Muskogee County as:

The foregoing instrument was acknowledged before me this 13th day of May, 1983 by Jim Biffle, partner, Sooner Vista Partnership

(person acknowledging)

My commission expires:
8-16-86

Sherry E. Ray
Notary Public

GUARANTY AGREEMENT May 13, 1983

Debtor Name and Address	Bank Name and Address
Mike Barnett 3903 Green Hills Court Norman, Oklahoma 73069	Victor Federal Savings & Loan 420 West Broadway Muskogee, Oklahoma 74401

For value received, and for the purpose of enabling the above named Debtor to obtain or renew loans, credit or other financial accommodation from the Bank named herein, each of the undersigned as a primary obligor, jointly and severally and unconditionally: (1) guarantees to the Bank that Debtor will fully and promptly pay and discharge all indebtedness upon which Debtor now is or may hereafter, from time to time, become obligated to Bank either as principal guarantor, endorser, or in any other capacity, and whether created by direct dealing with Bank or through transfer from others, and regardless of the nature and form of such indebtedness, including judgment, promissory notes, open accounts or any other form of indebtedness or obligation: (2) agrees, without the Bank first having to proceed against Debtor or to liquidate any security, to pay on demand all sums due and to become due or incurred by Bank by reason of Debtor's default: and (3) further agrees to be bound by and on demand to pay any deficiency established by a sale of security held by Bank with or without notice to the undersigned.

Bank may at any time without the consent of or notice to the undersigned without incurring responsibility to the undersigned and without impairing or releasing the obligations of the undersigned, and upon any terms and conditions the Bank may elect: (1) change the manner, place or

terms of payment or extend the time of payment of any indebtedness of Debtor to Bank: (2) renew or alter any indebtedness of Debtor to Bank: (3) raise or lower the interest rate or rates charged Debtor: (4) sell, exchange, release, surrender, realize upon or otherwise deal with in any manner and in any order any property at any time pledged to secure or securing the indebtedness of Debtor to Bank any liabilities incurred directly or indirectly hereunder or any offsets against any such indebtedness or liabilities: (5) exercise or refrain from exercising any rights against Debtor or others or otherwise act or refrain from acting: (6) settle or compromise any indebtedness hereby guaranteed or hereby incurred: (7) subordinate the payment of all or any part of any indebtedness of Debtor to Bank regardless of what indebtedness or liability of Debtor to Bank remains unpaid.

This guaranty shall be absolute, unconditional and continuing and shall be binding upon the undersigned, heirs of the undersigned, and the estate or estates of the undersigned, notwithstanding the death of any of the undersigned or of any guarantor or any other party liable upon any indebtedness or other obligation hereby guaranteed. Any one or more of the undersigned or any party liable upon any indebtedness or other obligation hereby guaranteed may be released without affecting the liability hereunder of any of the undersigned or any other party not so released. The undersigned further agree to the addition of guarantors without notice.

All rights of the Bank are cumulative and not alternative to other rights. The Bank may assign this Agreement or any of its rights and powers hereunder, with all or any of the indebtedness hereby guaranteed, and may assign to any such assignee any of the security therefore and in the event of such assignment, the assignee hereof shall have the same rights and remedies as if originally named herein

in place of Bank, and the Bank shall thereafter by fully discharged from all responsibility with respect to any such indebtedness so assigned.

This Guaranty Agreement is understood to be unlimited in amount unless expressly limited to the following:

Ten percent (10%) (plus closing costs estimated at $5,000.00) of original loan of Two Hundred Fourteen Thousand Two Hundred Dollars and no/100 cents ($214,200.00) on Vista Towers Condominium.

The undersigned may, by written notice given to and received by Bank, withdraw from liability for additional indebtedness of Debtor accepted by or incurred to Bank from the time of receipt of such notice by Bank, but the liability of the undersigned shall not be otherwise affected.

WITNESSES SIGNATURES	GUARANTORS SIGNATURES
/s/ Sherry E. Ray	Mike Barnett
	Mike Barnett

GUARANTY AGREEMENT May 13, 1983

Debtor Name and Address	Bank Name and Address
Jim H. Biffle The Philtower Penthouse Tulsa, Oklahoma 74103	Victor Federal Savings & Loan 420 West Broadway Muskogee, Oklahoma 74401

For value received, and for the purpose of enabling the above named Debtor to obtain or renew loans, credit or other financial accommodation from the Bank named herein, each of the undersigned as a primary obligor, jointly and severally and unconditionally: (1) guarantees to the Bank that Debtor will fully and promptly pay and discharge all indebtedness upon which Debtor now is or may hereafter, from time to time, become obligated to Bank either as principal guarantor, endorser, or in any other capacity, and whether created by direct dealing with Bank or through transfer from others, and regardless of the nature and form of such indebtedness, including judgment, promissory notes, open accounts or any other form of indebtedness or obligation: (2) agrees, without the Bank first having to proceed against Debtor or to liquidate any security, to pay on demand all sums due and to become due or incurred by Bank by reason of Debtor's default: and (3) further agrees to be bound by and on demand to pay any deficiency established by a sale of security held by Bank with or without notice to the undersigned.

Bank may at any time without the consent of or notice to the undersigned without incurring responsibility to the undersigned and without impairing or releasing the obligations of the undersigned, and upon any terms and conditions the Bank may elect: (1) change the manner, place or

terms of payment or extend the time of payment of any indebtedness of Debtor to Bank: (2) renew or alter any indebtedness of Debtor to Bank: (3) raise or lower the interest rate or rates charged Debtor: (4) sell, exchange, release, surrender, realize upon or otherwise deal with in any manner and in any order any property at any time pledged to secure or securing the indebtedness of Debtor to Bank any liabilities incurred directly or indirectly hereunder or any offsets against any such indebtedness or liabilities: (5) exercise or refrain from exercising any rights against Debtor or others or otherwise act or refrain from acting: (6) settle or compromise any indebtedness hereby guaranteed or hereby incurred: (7) subordinate the payment of all or any part of any indebtedness of Debtor to Bank regardless of what indebtedness or liability of Debtor to Bank remains unpaid.

This guaranty shall be absolute, unconditional and continuing and shall be binding upon the undersigned, heirs of the undersigned, and the estate or estates of the undersigned, notwithstanding the death of any of the undersigned or of any guarantor or any other party liable upon any indebtedness or other obligation hereby guaranteed. Any one or more of the undersigned or any party liable upon any indebtedness or other obligation hereby guaranteed may be released without affecting the liability hereunder of any of the undersigned or any other party not so released. The undersigned further agree to the addition of guarantors without notice.

All rights of the Bank are cumulative and not alternative to other rights. The Bank may assign this Agreement or any of its rights and powers hereunder, with all or any of the indebtedness hereby guaranteed, and may assign to any such assignee any of the security therefore and in the event of such assignment, the assignee hereof shall have the same rights and remedies as if originally named herein

in place of Bank, and the Bank shall thereafter by fully discharged from all responsibility with respect to any such indebtedness so assigned.

This Guaranty Agreement is understood to be unlimited in amount unless expressly limited to the following:

Ten percent (10%) (plus closing costs estimated at $5,000.00) of original loan of Two Hundred Fourteen Thousand Two Hundred Dollars and no/100 cents ($214,200.00) on Vista Towers Condominium.

The undersigned may, by written notice given to and received by Bank, withdraw from liability for additional indebtedness of Debtor accepted by or incurred to Bank from the time of receipt of such notice by Bank, but the liability of the undersigned shall not be otherwise affected.

WITNESSES SIGNATURES	GUARANTORS SIGNATURES
/s/ Sherry E. Ray	Jim H. Biffle
	Jim H. Biffle

GUARANTY AGREEMENT May 13, 1983

Debtor Name and Address	Bank Name and Address
John R. Helton 7505 S. Braden Tulsa, Oklahoma 74136	Victor Federal Savings & Loan 420 West Broadway Muskogee, Oklahoma 74401

For value received, and for the purpose of enabling the above named Debtor to obtain or renew loans, credit or other financial accommodation from the Bank named herein, each of the undersigned as a primary obligor, jointly and severally and unconditionally: (1) guarantees to the Bank that Debtor will fully and promptly pay and discharge all indebtedness upon which Debtor now is or may hereafter, from time to time, become obligated to Bank either as principal guarantor, endorser, or in any other capacity, and whether created by direct dealing with Bank or through transfer from others, and regardless of the nature and form of such indebtedness, including judgment, promissory notes, open accounts or any other form of indebtedness or obligation: (2) agrees, without the Bank first having to proceed against Debtor or to liquidate any security, to pay on demand all sums due and to become due or incurred by Bank by reason of Debtor's default: and (3) further agrees to be bound by and on demand to pay any deficiency established by a sale of security held by Bank with or without notice to the undersigned.

Bank may at any time without the consent of or notice to the undersigned without incurring responsibility to the undersigned and without impairing or releasing the obligations of the undersigned, and upon any terms and conditions the Bank may elect: (1) change the manner, place or

terms of payment or extend the time of payment of any indebtedness of Debtor to Bank: (2) renew or alter any indebtedness of Debtor to Bank: (3) raise or lower the interest rate or rates charged Debtor: (4) sell, exchange, release, surrender, realize upon or otherwise deal with in any manner and in any order any property at any time pledged to secure or securing the indebtedness of Debtor to Bank any liabilities incurred directly or indirectly hereunder or any offsets against any such indebtedness or liabilities: (5) exercise or refrain from exercising any rights against Debtor or others or otherwise act or refrain from acting: (6) settle or compromise any indebtedness hereby guaranteed or hereby incurred: (7) subordinate the payment of all or any part of any indebtedness of Debtor to Bank regardless of what indebtedness or liability of Debtor to Bank remains unpaid.

This guaranty shall be absolute, unconditional and continuing and shall be binding upon the undersigned, heirs of the undersigned, and the estate or estates of the undersigned, notwithstanding the death of any of the undersigned or of any guarantor or any other party liable upon any indebtedness or other obligation hereby guaranteed. Any one or more of the undersigned or any party liable upon any indebtedness or other obligation hereby guaranteed may be released without affecting the liability hereunder of any of the undersigned or any other party not so released. The undersigned further agree to the addition of guarantors without notice.

All rights of the Bank are cumulative and not alternative to other rights. The Bank may assign this Agreement or any of its rights and powers hereunder, with all or any of the indebtedness hereby guaranteed, and may assign to any such assignee any of the security therefore and in the event of such assignment, the assignee hereof shall have the same rights and remedies as if originally named herein

in place of Bank, and the Bank shall thereafter by fully discharged from all responsibility with respect to any such indebtedness so assigned.

This Guaranty Agreement is understood to be unlimited in amount unless expressly limited to the following:

Ten percent (10%) (plus closing costs estimated at $5,000.00) of original loan of Two Hundred Fourteen Thousand Two Hundred Dollars and no/100 cents ($214,200.00) on Vista Towers Condominium.

The undersigned may, by written notice given to and received by Bank, withdraw from liability for additional indebtedness of Debtor accepted by or incurred to Bank from the time of receipt of such notice by Bank, but the liability of the undersigned shall not be otherwise affected.

WITNESSES SIGNATURES	GUARANTORS SIGNATURES
/s/ Sherry E. Ray	John R. Helton
	John R. Helton

GUARANTY AGREEMENT May 13, 1983

Debtor Name and Address	Bank Name and Address
Jeff Hirzel 824 East Cleveland Cuthrie, Oklahoma 74044	Victor Federal Savings & Loan 420 West Broadway Muskogee, Oklahoma 74401

For value received, and for the purpose of enabling the above named Debtor to obtain or renew loans, credit or other financial accommodation from the Bank named herein, each of the undersigned as a primary obligor, jointly and severally and unconditionally: (1) guarantees to the Bank that Debtor will fully and promptly pay and discharge all indebtedness upon which Debtor now is or may hereafter, from time to time, become obligated to Bank either as principal guarantor, endorser, or in any other capacity, and whether created by direct dealing with Bank or through transfer from others, and regardless of the nature and form of such indebtedness, including judgment, promissory notes, open accounts or any other form of indebtedness or obligation: (2) agrees, without the Bank first having to proceed against Debtor or to liquidate any security, to pay on demand all sums due and to become due or incurred by Bank by reason of Debtor's default: and (3) further agrees to be bound by and on demand to pay any deficiency established by a sale of security held by Bank with or without notice to the undersigned.

Bank may at any time without the consent of or notice to the undersigned without incurring responsibility to the undersigned and without impairing or releasing the obligations of the undersigned, and upon any terms and conditions the Bank may elect: (1) change the manner, place or

terms of payment or extend the time of payment of any indebtedness of Debtor to Bank: (2) renew or alter any indebtedness of Debtor to Bank: (3) raise or lower the interest rate or rates charged Debtor: (4) sell, exchange, release, surrender, realize upon or otherwise deal with in any manner and in any order any property at any time pledged to secure or securing the indebtedness of Debtor to Bank any liabilities incurred directly or indirectly hereunder or any offsets against any such indebtedness or liabilities: (5) exercise or refrain from exercising any rights against Debtor or others or otherwise act or refrain from acting: (6) settle or compromise any indebtedness hereby guaranteed or hereby incurred: (7) subordinate the payment of all or any part of any indebtedness of Debtor to Bank regardless of what indebtedness or liability of Debtor to Bank remains unpaid.

This guaranty shall be absolute, unconditional and continuing and shall be binding upon the undersigned, heirs of the undersigned, and the estate or estates of the undersigned, notwithstanding the death of any of the undersigned or of any guarantor or any other party liable upon any indebtedness or other obligation hereby guaranteed. Any one or more of the undersigned or any party liable upon any indebtedness or other obligation hereby guaranteed may be released without affecting the liability hereunder of any of the undersigned or any other party not so released. The undersigned further agree to the addition of guarantors without notice.

All rights of the Bank are cumulative and not alternative to other rights. The Bank may assign this Agreement or any of its rights and powers hereunder, with all or any of the indebtedness hereby guaranteed, and may assign to any such assignee any of the security therefore and in the event of such assignment, the assignee hereof shall have the same rights and remedies as if originally named herein

in place of Bank, and the Bank shall thereafter by fully discharged from all responsibility with respect to any such indebtedness so assigned.

This Guaranty Agreement is understood to be unlimited in amount unless expressly limited to the following:

Ten percent (10%) (plus closing costs estimated at $5,000.00) of original loan of Two Hundred Fourteen Thousand Two Hundred Dollars and no/100 cents ($214,200.00) on Vista Towers Condominium.

The undersigned may, by written notice given to and received by Bank, withdraw from liability for additional indebtedness of Debtor accepted by or incurred to Bank from the time of receipt of such notice by Bank, but the liability of the undersigned shall not be otherwise affected.

WITNESSES SIGNATURES	GUARANTORS SIGNATURES
/s/ Sherry E. Ray	Jeff Hirzel
	Jeff Hirzel

GUARANTY AGREEMENT May 13, 1983

Debtor Name and Address	Bank Name and Address
James Little 17 Park Lane Galveston, Texas 77551	Victor Federal Savings & Loan 420 West Broadway Muskogee, Oklahoma 74401

For value received, and for the purpose of enabling the above named Debtor to obtain or renew loans, credit or other financial accommodation from the Bank named herein, each of the undersigned as a primary obligor, jointly and severally and unconditionally: (1) guarantees to the Bank that Debtor will fully and promptly pay and discharge all indebtedness upon which Debtor now is or may hereafter, from time to time, become obligated to Bank either as principal guarantor, endorser, or in any other capacity, and whether created by direct dealing with Bank or through transfer from others, and regardless of the nature and form of such indebtedness, including judgment, promissory notes, open accounts or any other form of indebtedness or obligation: (2) agrees, without the Bank first having to proceed against Debtor or to liquidate any security, to pay on demand all sums due and to become due or incurred by Bank by reason of Debtor's default: and (3) further agrees to be bound by and on demand to pay any deficiency established by a sale of security held by Bank with or without notice to the undersigned.

Bank may at any time without the consent of or notice to the undersigned without incurring responsibility to the undersigned and without impairing or releasing the obligations of the undersigned, and upon any terms and conditions the Bank may elect: (1) change the manner, place or

terms of payment or extend the time of payment of any indebtedness of Debtor to Bank: (2) renew or alter any indebtedness of Debtor to Bank: (3) raise or lower the interest rate or rates charged Debtor: (4) sell, exchange, release, surrender, realize upon or otherwise deal with in any manner and in any order any property at any time pledged to secure or securing the indebtedness of Debtor to Bank any liabilities incurred directly or indirectly hereunder or any offsets against any such indebtedness or liabilities: (5) exercise or refrain from exercising any rights against Debtor or others or otherwise act or refrain from acting: (6) settle or compromise any indebtedness hereby guaranteed or hereby incurred: (7) subordinate the payment of all or any part of any indebtedness of Debtor to Bank regardless of what indebtedness or liability of Debtor to Bank remains unpaid.

This guaranty shall be absolute, unconditional and continuing and shall be binding upon the undersigned, heirs of the undersigned, and the estate or estates of the undersigned, notwithstanding the death of any of the undersigned or of any guarantor or any other party liable upon any indebtedness or other obligation hereby guaranteed. Any one or more of the undersigned or any party liable upon any indebtedness or other obligation hereby guaranteed may be released without affecting the liability hereunder of any of the undersigned or any other party not so released. The undersigned further agree to the addition of guarantors without notice.

All rights of the Bank are cumulative and not alternative to other rights. The Bank may assign this Agreement or any of its rights and powers hereunder, with all or any of the indebtedness hereby guaranteed, and may assign to any such assignee any of the security therefore and in the event of such assignment, the assignee hereof shall have the same rights and remedies as if originally named herein

in place of Bank, and the Bank shall thereafter by fully discharged from all responsibility with respect to any such indebtedness so assigned.

This Guaranty Agreement is understood to be unlimited in amount unless expressly limited to the following:

Ten percent (10%) (plus closing costs estimated at $5,000.00) of original loan of Two Hundred Fourteen Thousand Two Hundred Dollars and no/100 cents ($214,200.00) on Vista Towers Condominium.

The undersigned may, by written notice given to and received by Bank, withdraw from liability for additional indebtedness of Debtor accepted by or incurred to Bank from the time of receipt of such notice by Bank, but the liability of the undersigned shall not be otherwise affected.

WITNESSES SIGNATURES	GUARANTORS SIGNATURES
/s/ Sherry E. Ray	James W. Little
	James Little

GUARANTY AGREEMENT May 13, 1983

Debtor Name and Address	Bank Name and Address
Kenneth Miller 4301 NW 63rd, Suite 303 Oklahoma City, Oklahoma 73116	Victor Federal Savings & Loan 420 West Broadway Muskogee, Oklahoma 74401

For value received, and for the purpose of enabling the above named Debtor to obtain or renew loans, credit or other financial accommodation from the Bank named herein, each of the undersigned as a primary obligor, jointly and severally and unconditionally: (1) guarantees to the Bank that Debtor will fully and promptly pay and discharge all indebtedness upon which Debtor now is or may hereafter, from time to time, become obligated to Bank either as principal guarantor, endorser, or in any other capacity, and whether created by direct dealing with Bank or through transfer from others, and regardless of the nature and form of such indebtedness, including judgment, promissory notes, open accounts or any other form of indebtedness or obligation: (2) agrees, without the Bank first having to proceed against Debtor or to liquidate any security, to pay on demand all sums due and to become due or incurred by Bank by reason of Debtor's default: and (3) further agrees to be bound by and on demand to pay any deficiency established by a sale of security held by Bank with or without notice to the undersigned.

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terms of payment or extend the time of payment of any indebtedness of Debtor to Bank: (2) renew or alter any indebtedness of Debtor to Bank: (3) raise or lower the interest rate or rates charged Debtor: (4) sell, exchange, release, surrender, realize upon or otherwise deal with in any manner and in any order any property at any time pledged to secure or securing the indebtedness of Debtor to Bank any liabilities incurred directly or indirectly hereunder or any offsets against any such indebtedness or liabilities: (5) exercise or refrain from exercising any rights against Debtor or others or otherwise act or refrain from acting: (6) settle or compromise any indebtedness hereby guaranteed or hereby incurred: (7) subordinate the payment of all or any part of any indebtedness of Debtor to Bank regardless of what indebtedness or liability of Debtor to Bank remains unpaid.

This guaranty shall be absolute, unconditional and continuing and shall be binding upon the undersigned, heirs of the undersigned, and the estate or estates of the undersigned, notwithstanding the death of any of the undersigned or of any guarantor or any other party liable upon any indebtedness or other obligation hereby guaranteed. Any one or more of the undersigned or any party liable upon any indebtedness or other obligation hereby guaranteed may be released without affecting the liability hereunder of any of the undersigned or any other party not so released. The undersigned further agree to the addition of guarantors without notice.

All rights of the Bank are cumulative and not alternative to other rights. The Bank may assign this Agreement or any of its rights and powers hereunder, with all or any of the indebtedness hereby guaranteed, and may assign to any such assignee any of the security therefore and in the event of such assignment, the assignee hereof shall have the same rights and remedies as if originally named herein

in place of Bank, and the Bank shall thereafter by fully discharged from all responsibility with respect to any such indebtedness so assigned.

This Guaranty Agreement is understood to be unlimited in amount unless expressly limited to the following:

Ten percent (10%) (plus closing costs estimated at $5,000.00) of original loan of Two Hundred Fourteen Thousand Two Hundred Dollars and no/100 cents ($214,200.00) on Vista Towers Condominium.

The undersigned may, by written notice given to and received by Bank, withdraw from liability for additional indebtedness of Debtor accepted by or incurred to Bank from the time of receipt of such notice by Bank, but the liability of the undersigned shall not be otherwise affected.

WITNESSES SIGNATURES	GUARANTORS SIGNATURES
/s/ Bety J. Westerman	Kenneth E. Miller
	Kenneth E. Miller

GUARANTY AGREEMENT May 13, 1983

Debtor Name and Address	Bank Name and Address
Phillip E. Snoddy	Victor Federal Savings & Loan
Monarch Interiors	
7633 E. 63rd Pl. Ste. 319	420 West Broadway
Tulsa, Oklahoma 74133	Muskogee, Oklahoma 74401

For value received, and for the purpose of enabling the above named Debtor to obtain or renew loans, credit or other financial accommodation from the Bank named herein, each of the undersigned as a primary obligor, jointly and severally and unconditionally: (1) guarantees to the Bank that Debtor will fully and promptly pay and discharge all indebtedness upon which Debtor now is or may hereafter, from time to time, become obligated to Bank either as principal guarantor, endorser, or in any other capacity, and whether created by direct dealing with Bank or through transfer from others, and regardless of the nature and form of such indebtedness, including judgment, promissory notes, open accounts or any other form of indebtedness or obligation: (2) agrees, without the Bank first having to proceed against Debtor or to liquidate any security, to pay on demand all sums due and to become due or incurred by Bank by reason of Debtor's default: and (3) further agrees to be bound by and on demand to pay any deficiency established by a sale of security held by Bank with or without notice to the undersigned.

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terms of payment or extend the time of payment of any indebtedness of Debtor to Bank: (2) renew or alter any indebtedness of Debtor to Bank: (3) raise or lower the interest rate or rates charged Debtor: (4) sell, exchange, release, surrender, realize upon or otherwise deal with in any manner and in any order any property at any time pledged to secure or securing the indebtedness of Debtor to Bank any liabilities incurred directly or indirectly hereunder or any offsets against any such indebtedness or liabilities: (5) exercise or refrain from exercising any rights against Debtor or others or otherwise act or refrain from acting: (6) settle or compromise any indebtedness hereby guaranteed or hereby incurred: (7) subordinate the payment of all or any part of any indebtedness of Debtor to Bank regardless of what indebtedness or liability of Debtor to Bank remains unpaid.

This guaranty shall be absolute, unconditional and continuing and shall be binding upon the undersigned, heirs of the undersigned, and the estate or estates of the undersigned, notwithstanding the death of any of the undersigned or of any guarantor or any other party liable upon any indebtedness or other obligation hereby guaranteed. Any one or more of the undersigned or any party liable upon any indebtedness or other obligation hereby guaranteed may be released without affecting the liability hereunder of any of the undersigned or any other party not so released. The undersigned further agree to the addition of guarantors without notice.

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in place of Bank, and the Bank shall thereafter by fully discharged from all responsibility with respect to any such indebtedness so assigned.

This Guaranty Agreement is understood to be unlimited in amount unless expressly limited to the following:

Ten percent (10%) (plus closing costs estimated at $5,000.00) of original loan of Two Hundred Fourteen Thousand Two Hundred Dollars and no/100 cents ($214,200.00) on Vista Towers Condominium.

The undersigned may, by written notice given to and received by Bank, withdraw from liability for additional indebtedness of Debtor accepted by or incurred to Bank from the time of receipt of such notice by Bank, but the liability of the undersigned shall not be otherwise affected.

WITNESSES SIGNATURES	GUARANTORS SIGNATURES
/s/ illegible	Phillip E. Snoddy
	Phillip E. Snoddy

GUARANTY AGREEMENT May 13, 1983

Debtor Name and Address	Bank Name and Address
Marvin L. Wynn Whiteside & Grant Real. Parkland Plaza Bldg. 2121 South Columbia Tulsa, Oklahoma 74114	Victor Federal Savings & Loan 420 West Broadway Muskogee, Oklahoma 74401

For value received, and for the purpose of enabling the above named Debtor to obtain or renew loans, credit or other financial accommodation from the Bank named herein, each of the undersigned as a primary obligor, jointly and severally and unconditionally: (1) guarantees to the Bank that Debtor will fully and promptly pay and discharge all indebtedness upon which Debtor now is or may hereafter, from time to time, become obligated to Bank either as principal guarantor, endorser, or in any other capacity, and whether created by direct dealing with Bank or through transfer from others, and regardless of the nature and form of such indebtedness, including judgment, promissory notes, open accounts or any other form of indebtedness or obligation: (2) agrees, without the Bank first having to proceed against Debtor or to liquidate any security, to pay on demand all sums due and to become due or incurred by Bank by reason of Debtor's default: and (3) further agrees to be bound by and on demand to pay any deficiency established by a sale of security held by Bank with or without notice to the undersigned.

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This guaranty shall be absolute, unconditional and continuing and shall be binding upon the undersigned, heirs of the undersigned, and the estate or estates of the undersigned, notwithstanding the death of any of the undersigned or of any guarantor or any other party liable upon any indebtedness or other obligation hereby guaranteed. Any one or more of the undersigned or any party liable upon any indebtedness or other obligation hereby guaranteed may be released without affecting the liability hereunder of any of the undersigned or any other party not so released. The undersigned further agree to the addition of guarantors without notice.

All rights of the Bank are cumulative and not alternative to other rights. The Bank may assign this Agreement or any of its rights and powers hereunder, with all or any of the indebtedness hereby guaranteed, and may assign to any such assignee any of the security therefore and in the event of such assignment, the assignee hereof shall have the same rights and remedies as if originally named herein

in place of Bank, and the Bank shall thereafter by fully discharged from all responsibility with respect to any such indebtedness so assigned.

This Guaranty Agreement is understood to be unlimited in amount unless expressly limited to the following:

Ten percent (10%) (plus closing costs estimated at $5,000.00) of original loan of Two Hundred Fourteen Thousand Two Hundred Dollars and no/100 cents ($214,200.00) on Vista Towers Condominium.

The undersigned may, by written notice given to and received by Bank, withdraw from liability for additional indebtedness of Debtor accepted by or incurred to Bank from the time of receipt of such notice by Bank, but the liability of the undersigned shall not be otherwise affected.

WITNESSES SIGNATURES	GUARANTORS SIGNATURES
/s/ Sherry E. Ray	Marvin L. Wynn
	Marvin L. Wynn

ITEM #2

IN THE DISTRICT COURT OF DELAWARE COUNTY
STATE OF OKLAHOMA

FILED
AUG 15 1989

VICTOR SAVINGS AND LOAN ASSOCIATION,	)	
Plaintiff,	)	
vs.	)	No. C-85-371
SOONER VISTA, (a/k/a Sooner Vista Partnership) an Oklahoma general partnership; MIKE BARNETT, (individually, and as partner of Sooner Vista); JIM H. BIFFLE, (individually and as partner of Sooner Vista); JOHN R. HELTON (individually and as partner of Sooner Vista); JEFF L. HIRZEL (individually and as partner of Sooner Vista); JAMES W. LITTLE (individually and as partner of Sooner Vista); KENNETH E. MILLER (individually and as partner of Sooner Vista); PHILLIP E. SNODDY (individually and as partner of Sooner Vista) MARVIN L. WYNN (individually and as partner of Sooner Vista); JOHN STEPHEN HOPE (individually and as partner of Sooner Vista);	)	

COUNTY TREASURER OF DELAWARE COUNTY: BOARD OF COUNTY COMMISSIONERS OF DELAWARE COUNTY,

Defendants.

ANSWER OF DEFENDANTS HIRZEL, LITTLE, HELTON, WYNN, SNODDY, BARNETT AND MILLER TO AMENDED PETITION

The Defendants, Jeff L. Hirzel, James W. Little, Mike Barnett, John R. Helton, Phillip E. Snoddy, Marvin L. Wynn, and Kenneth E. Miller (collectively referred to as the "Defendants") answer the Amended Petition of the Federal Savings And Loan Insurance Corporation as follows:

1. The Defendants deny each and every allegation of the Amended Petition except as expressly admitted herein.

2. The Defendants admit the allegations contained in paragraphs 1 through 3 of the Amended Petition.

3. With respect to paragraph 4 of the Amended Petition, the Defendants admit execution of the Guaranty Agreements but deny the legal effect attributed to them by FSLIC.

4. With respect to paragraph 5 of the Amended Petition the Defendants admit an error in the execution of certain Guaranty Agreements but deny FSLIC's entitlement to reformation.

which might be determined to exist in favor of the Plaintiff and against these Defendants under, and as a result of any such individual Guaranties.

WHEREFORE, the Defendants pray that in the event these Defendants have any liability under their separate Guaranties to the Plaintiff, the release of the Defendant Hammons Guaranty by the Plaintiff be declared null and void and that the Defendant Hammons be required to share jointly and severally with these Defendants any liability which might be determined to exist in favor of the Plaintiff and against these Defendants under, and as a result, of such individual Guaranties. The Defendants further pray that they be entitled to recover their costs incurred herein, including a reasonable attorney's fee and such other further relief as this Court deems just and equitable.

Respectfully submitted,

/s/ Joal R. Hogue

Gene C. Buzzard, OBA #1396
Joel R. Hogue, OBA #11351

GABLE & GOTWALS, P.C.
2000 Fourth National Bank Building
15 West Sixth Street
Tulsa, Oklahoma 74119-1217

ATTORNEYS FOR DEFENDANTS JEFF L. HIRZEL, JAMES W. LITTLE, MIKE BARNETT, JOHN R. HELTON, PHILIP E. SNODDY, MARVIN L. WYNN AND KENNETH E. MILLER

ITEM #3

IN THE DISTRICT COURT OF DELAWARE COUNTY
STATE OF OKLAHOMA

FILED
JUL 14 1989

VICTOR SAVINGS AND LOAN ASSOCIATION,

Plaintiff,

vs.

No. C-85-371

SOONER VISTA, (a/k/a Sooner Vista Partnership) an Oklahoma general partnership; MIKE BARNETT, (individually, and as partner of Sooner Vista); JIM H. BIFFLE, (individually and as partner of Sooner Vista); JOHN R. HELTON (individually and as partner of Sooner Vista); JEFF L. HIRZEL (individually and as partner of Sooner Vista); JAMES W. LITTLE (individually and as partner of Sooner Vista); KENNETH E. MILLER (individually and as partner of Sooner Vista); PHILLIP E. SNODDY (individually and as partner of Sooner Vista); MARVIN L. WYNN (individually and as partner of Sooner Vista); JOHN STEPHEN HOPE (individually and as partner of Sooner Vista);

COUNTY TREASURER OF)
DELAWARE COUNTY: BOARD)
OF COUNTY COMMIS-)
SIONERS OF DELAWARE)
COUNTY,SHANGRI-LA VISTA)
TOWERS HOMEOWNERS ASSOCIATION;)
and CHARLES J. DAVIS,)
)
Defendants.)

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION'S MOTION FOR SUMMARY JUDGMENT

Federal Savings and Loan Insurance Corporation ("FSLIC") as receiver for Victor Savings and Loan Association ("Victor") hereby moves this Court, pursuant to Rule 13 of the Oklahoma District Court Rules, to enter a judgment in its favor as a matter of law since there are no genuine issues of material fact herein. In support thereof, FSLIC as receiver for Victor submits its Brief which is filed concurrently herewith.

WHEREFORE, FSLIC as receiver for Victor prays that this Court enter a judgment in its favor on its claims against Defendants.

Respectfully submitted,

HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.

By /s/ R. Mark Petrich,

William D. Nay, OBA #6588
R. Mark Petrich, OBA #11956
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2700

ATTORNEYS FOR FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION IN ITS CAPACITY AS RECEIVER FOR VICTOR SAVINGS AND LOAN ASSOCIATION

ITEM #4

IN THE DISTRICT COURT OF DELAWARE COUNTY
STATE OF OKLAHOMA

FILED
JUL 14 1989

VICTOR SAVINGS AND LOAN ASSOCIATION,	)	
Plaintiff,	)	
vs.	)	No. C-85-371
SOONER VISTA, (a/k/a Sooner Vista Partnership) an Oklahoma general partnership; MIKE BARNETT, (individually, and as partner of Sooner Vista); JIM H. BIFFLE, (individually and as partner of Sooner Vista); JOHN R. HELTON (individually and as partner of Sooner Vista); JEFF L. HIRZEL (individually and as partner of Sooner Vista); JAMES W. LITTLE (individually and as partner of Sooner Vista); KENNETH E. MILLER (individually and as partner of Sooner Vista); PHILLIP E. SNODDY (individually and as partner of Sooner Vista) MARVIN L. WYNN (individually and as partner of Sooner Vista); JOHN STEPHEN HOPE (individually and as partner of Sooner Vista);	)	

COUNTY TREASURER OF DELAWARE COUNTY: BOARD OF COUNTY COMMISSIONERS OF DELAWARE COUNTY,SHANGRI-LA VISTA TOWERS HOMEOWNERS ASSOCIATION; and CHARLES J. DAVIS,

Defendants.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The Federal Savings and Loan Insurance Corporation ("FSLIC") as receiver for Victor Savings and Loan Association ("Victor"), submits this Brief in Support of Motion for Summary Judgment.

I. Statement of Facts[1]

1. On May 13, 1983, Defendant Sooner Vista a/k/a Sooner Vista Partnership ("Sooner") was a general partnership formed pursuant to the laws of Oklahoma. On that date:

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[1] "Partners' Answer" means the Answer of Defendants, Jeff H. Hirzel, John R. Helton, Marvin L. Wynn, Phillip E. Snoody, James W. Little, Mike Barnett and Kenneth E. Miller filed February 19, 1986. "Hope's Answer" means that Answer and Crossclaim of Defendant John Stephen Hope to Amended Petition filed March 15, 1989. "Odean Affidavit" means the Affidavit of Gregory A. Odean, attached hereto as Exhibit "F". "Hope Deposition" means the excerpts from the deposition of Defendant James Stephen Hope, attached hereto as Exhibit "G".

Defendant Mike Barnett ("Barnett")
Defendant Jim H. Biffle ("Biffle")
Defendant John R. Helton ("Helton")
Defendant Jeff L. Hirzel ("Hirzel")
Defendant James W. Little ("Little")
Defendant Kenneth E. Miller ("Miller")
Defendant Phillip E. Snoddy ("Snoddy")
Defendant Marvin L. Wynn ("Wynn")

collectively "the Partners" and Royce M. Hammons were partners in the Sooner. Partners' Answer, Paragraphs 2 and 6; Hope Answer, Paragraph 1; Odean Affidavit, Paragraph 2.

2. On May 13, 1983, Victor Federal Savings & Loan Association, ("Victor Federal") made a loan to Sooner in the principal amount of $214,200.00 plus closing costs of 3,643,21 (Loan No. 20-018499-6). Sooner used the loan proceeds to purchase a condominium, Suite 1010 in Sooner Vista Towers at Grand Lake. In consideration of the loan, Sooner executed and delivered to Victor Federal a note in the principal amount of $217,843.21. A copy of the note is attached hereto as Exhibit "A". Partners' Answer, Paragraph 6; Hope Answer, paragraph 1; Odean Affidavit, Paragraph 3.

3. On May 13, 1983 and in conjunction with the execution and delivery of the note, Sooner executed and delivered to Victor Federal a mortgage on the following property:

> Unit 1010 of Shangri-La Vista Towers, a unit ownership estate according to the recorded declaration and plan thereof, and an undivided 1.10% interest in and to the common elements and appurtenances thereto belonging, all accord-

ing to and more particularly described and shown in the Declaration of Unit Ownership Estate and By-Laws of Shangri-La Vista Towers, recorded January 12, 1981, in Book 410, Pages 138-163, inclusive, in the Office of the County Clerk, Delaware County, Oklahoma.

("the property.") The mortgage tax was paid and the mortgage was recorded on May 17, 1983 in Book 447 at Page 587 in the records of the County Clerk of Delaware County, Oklahoma. A copy of the mortgage is attached hereto as Exhibit B. Partners' Answer, Paragraph 6; Hope Answer, Paragraph 1; Odean Affidavit, Paragraph 4.

4. On May 13, 1983 and in consideration of Victor Federal's loan to Sooner, the partners executed and delivered to Victor Federal written guaranty agreements, each of which unconditionally guaranteed payment of "10% (plus closing costs estimated at $5,000) of the original loan to Sooner of $214,200.00. Closing costs on the loan totalled $3,643.21. Copies of the guaranties are attached hereto as Exhibit "C-1" through "C-7". Partners' Answer, Paragraphs 6 and 7; Hope Answer, Paragraph 1; Odean Affidavit, Paragraph 5.

5. As a result of scrivener's error, the Partners' guaranties, while intended by Victor Federal and the partners to guarantee to Victor Federal the indebtedness of Sooner, as debtor, instead listed the various Partners as the "debtors" on the guaranties. Partners' Answer, Paragraphs 6 and 7. Exhibits "A", "B", "C-1" through "C-7".

6. On or about January 14, 1985, Hope became a partner in Sooner. In consideration of Victor Federal's forbearance from filing suit upon the note, Defendant John

Stephen Hope ("Hope") executed and delivered to Victor Federal a written guaranty agreement which guaranteed 10% of Loan No. 20-018499-6, with a balance of $217,313.04 as of March 13, 1985, of the original loan of $214,200.00 dated May 13, 1983, on the Property. A copy of Hope's guaranty is attached hereto as Exhibit "D". Hope Deposition, 6(5-14); 11(13)-16(21); 19(8)-21(4); 25(16-15). Odean Affidavit, Paragraph 7; Hope Deposition, 4(11)-6(4); 6(25)-7(3).

7. On March 13, 1985, the note was in default. On that date, Sooner executed and delivered to Victor Federal an adjustable rate note (the "revised note") which incorporated the balance of Sooner's indebtedness for the original loan of $214,200 plus closing costs. A copy of the revised note is attached hereto as Exhibit "E". The maturity date of the revised note was May 1, 1986. The revised note was secured by the mortgage. Upon the delivery of the revised note to Victor Federal, Victor Federal did *not* mark the note "Paid" or otherwise cancel it, nor was the note returned to Sooner; it was held by Victor Federal. No new funds were disbursed on the basis of the revised note; no new funds were disbursed on the basis of the revised note; no new loan account was opened in Victor Federal's records. Rather, the loan continued to be handled under the same account number asigned to the note. Victor Federal did not release the Partners from liability on the note or their guaranties by means of any written or verbal release. The revised note was used only to change the interest rate applied to the loan account. Odean Affidavit, Paragraph 8.

8. In August, 1985, Sooner defaulted on the revised note. On September 16, 1985, Sooner, Hope and the Partners were sent a demand letter. The default was not cured and the revised note was accelerated on October 16, 1985. Odean Affidavit, Paragraph 9.

9. On March 13, 1987, the Federal Home Loan Bank Board ("FHLBB") placed Victor Federal into receivership with the FSLIC acting as receiver. On the same date, the assets of Victor Federal, including the note, mortgage, guaranties and revised note involved in this case, were transferred to Victor Savings & Loan Association, a federal savings and loan association ("Victor"). Hope Answer, Paragraph 1; Odean Affidavit, Paragraph 10.

10. On July 28, 1988, the Bank Board placed Victor into receivership with the FSLIC acting as receiver. Odean Affidavit, Paragraph 11.

11. The following amounts are now owed pursuant to Loan No. 20-01849-6::

Principal	$228,205.04
Interest through November 18, 1988	$ 60,752.46
Interest from November 19, 1988	$ 49.92 per day
Late charges through November 18, 1988	$ 3,422.40
Abstracting expenses	$ 50.00
Maintenance expenses	$ 1,912.43

Odean Affidavit, Paragraph 12.

12. Defendant Shangri-La Vista Towers Homeowners Association ("Homeowners Association") filed against the Property a vendor's lien in the amount of

$11,333.79, which was recorded on December 6, 1985, in Book 495 at Page 731, of the records of the County Clerk of Delaware County, Oklahoma. The Homeowners Association's lien is inferior to that of FSLIC.

13. The Defendants, the County Treasurer of Delaware County (the "Treasurer") and the Board of County Commissioners (the "Commissioners") claim some interest in the Property by reason of unpaid ad valorem taxes for the years 1983 to the present.

14. On December 6, 1985, the Defendant Charles J. Davis ("Davis") filed against the Property a lien in the amount of $4,232.50, which was recorded in Book 495 at Page 730 of the records of the County Clerk of Delaware County, Oklahoma. Davis' lien is inferior to that of FSLIC.

II. ARGUMENT

The motion for summary judgment is made pursuant to OKLA. DIST. CT. R. 13. Rule 13(e) provides:

> If it appears to the court that there is no substantial controversy as to any material fact and that one of the parties is entitled to judgment as a matter of law, the court shall render judgment to said party whether or not he is the moving party.
>
> If the court finds that there is no substantial controversy as to certain facts or issues, it shall make an order specifying the facts or issues which are not in controversy and direct that the action proceed for a determination of the remaining fact or issues, and such order is interlocutory and is not reviewable on appeal prior to final judgment.

Suits to enforce negotiable instruments are among the most suitable classes of cases for summary judgment. *Lloyd v. Lawrence*, 472 F.2d 313, 316 (5th Cir. 1973).

A. ***FSLIC'S PRIMA FACIE CASE***

1. ***FIRST CLAIM FOR RELIEF (NOTE):***

a. ***Sooner.***

A prima facie case for summary judgment against Sooner has been made by FSLIC: the execution and delivery of the note, Sooner's default in payments and the amount due, and Sooner's failure to pay the indebtedness. *Anderson v. Scanlon*, 60 P.2d 615, 618 (Okla. 1935).

b. ***Partners.***

OKLA. STAT. tit. 54 § 215 provides:

> *All partners are liable*
>
> (a) Jointly and severally for everything chargeable to the partnership under Sections 13 and 14. [Inapplicable here].
>
> (b) *Jointly for all other debts* and obligations of the partnerhsip; but any partner may enter into a separate obligation to perform a partnership contract.

(Emphasis added). Partners are jointly liable for debts of a partnership dispite the fact that the partnership is deemed a distinct entity separate from the individuals composing it. *Southard v. Oil Equipment Corp.*, 296 P.2d 780, 784 (Okla. 1956). In a case such as this, in which the Partners are individually served, the judgment should be rendered against the partnership with the provision that, if the partnership property is insufficient to satisfy the judgment, then execution may issue against the individuals composing the partnership. The Oklahoma Supreme Court has

stated that the proper form of judgment to be rendered in an action against a copartnership is:

> That the said plaintiff have and recover of and from the defendants Taylor, Taylor & Joe Davis, a copartnership composed of Leroy T. Taylor, O.G. Taylor, and Joe Davis, all of whom were personally served with summons, the sum of $685.50, together with all the costs of this action; for all of which *let execution issue against said partnership and the joint property be subjected to the payment of the said amount, and, if the partnership property be insufficient to satisfy the judgment, then let execution issue against the individuals* composing the partnership.

See Hassen v. Rogers, 253 P. 72, 74 (Okla. 1926) (emphasis added. *See also Heaton v. Schaeffer,* 126 P. 797, 798 (Okla. 1912).

2. ***SECOND CLAIM FOR RELIEF (MORTGAGE FORCLOSURE):***

Because of Sooner's default in payments, FSLIC has an undisputed right to have the mortgage foreclosed. Because of its priority in time, FSLIC's mortgage is superior to any liens claimed by any defendant named herein.

3. ***THIRD CLAIM FOR RELIEF (REFORMATION OF GUARANTIES):***

In general, where by reason of a scrivener's mistake, an instrument omits or contains terms or stipulations contrary to the common intention of the parties, a court of equity will consider it a mutual mistake common to both parties and correct the error in a manner that will place the

parties in the position they would have occupied had the error not occurred. *Dennis v. American — First Title & Trust Co.*, 405 P.2d 993 (Okla. 1965) Court syllabus 2; *Matlock v. Wheeler*, 306 P.2d 325 (Okla. 1956); *Davenport v. Beck*, 576 P.2d 1199, 1201 (Okla. App. 1977). As stated by the Oklahoma Supreme Court:

> Where there is no mistake about the agreement, and the only mistake alleged is in the reduction of that agreement to writing, such mistake of the scrivener, or of either party, no matter how it occurred, may be corrected. *Ambrose v. Province*, 300 P. 758, 759 (Okla. 1931).

In short, equity will correct errors in an instrument shown to have resulted from an unintentional drafting mistake. *Davenport*, 576 P.2d at 1203.

In Oklahoma, the courts have reformed a variety of instruments as a result of scrivener's errors. *See Cunnius v. Field*, 449 P.2d 703 (Okla. 1969); *Welch v. Ruby*, 198 P.2d 432 (Okla. 1948); *Crabb v. Chisum*, 80 P.2d 653 (Okla. 1938); *Fidelity-Phoenix Fire Insurance Co. v. First National Bank*, 292 P. 829 (Okla. 1932), the court affirmed the reformation of a fidelity bond in which the name of the company which was the beneficiary of the bond had erroneously been placed in the space reserved for the bonded employee. The court relied on the following principles in reforming the bond:

> (Sureties) will not be relieved merely because they execute an instrument different from the one intended, nor will a clerical error which could not have misled, free them from liability.
>
> . . .Mistake may not only be expressly established but it may be inferred form the circumstances and

the nature of the transaction.

> . . .Where by mistake, the condition is so drawn as to be insensible and invalid, it may be read and construed in the light of the evident intention accords with justice and the rights of the case.

McClure, 12 P.2d at 880.

In *Keith v. Thomas,* 165 N.E. 679 (Mass. 1929), the name of the debtor in a guaranty was erreoneously stated to be Claude B. Thomas; credit was actually extended to C. B. Thomas Company, a corporation. The appellant court in affirming the decision of the trial court to reform the guaranty stated:

> As originally drawn, the instrument was valueless in the hands of the plaintiff; Claude B. Thomas had no account with them and had purchased no goods from them individually. In these circumstances it was proper to grant the prayer for reformation upon the ground that there was a mutual mistake as to the legal effect of the language used.

Keith, 165 N.E. at 680-681. See also *Bank of America National Trust & Savings Association v. Craig,* 14 Cal. Rptr. 476 (App. 1961).

In the case at bar, the Partners admit that they each executed the respective guaranty, and that each guaranty limited the individual liability of each Partner to ten percent (10%) of the original loan indebtedness represented by the note, plus certain closing costs not to exceed $5,000. The indebtedness represented by the note was incurred by Sooner, not by the Partners as individuals. The guarnanties mistakenly define "Debtor" as the individual who sign-

ed the guaranty, rather than as "Sooner", the entity whose indebtedness was intended to be guaranteed. Based on the foregoing authorities, the Partners' guaranties should be reformed to express the true intent of the parties. The stated name of the debtor should be "Sooner Vista a/k/a Sooner Vista Partnership, an Oklahoma general partnership".

4. ***FOURTH CLAIM FOR RELIEF (GUARANTIES):***

A guarantor's undertaking creates a collateral obligation independent and separately enforceable from that of the principal debtor. *Riverside National Bank v. Manolakis,* 613 P.2d 438, 441 (Okla. 1980). The obligation of a guaranty is contractual, and the Court's inquiry must, in each case, focus on the precise terms of the guarantor's undertaking. *Manolakis,* 613 P.2d at 441.

Each Partner's guaranty subject to this action provides that it is "absolute, unconditional and continnuing. . . ." Each Partner unconditionally:

> (1) guarantees to the Bank that Debtor will fully and promptly pay and discharge all indebtedness upon which Debtor now is or may hereafter, from time to time, become obligated to Bank either as principal guarantor, endorser, or in any other capacity . . . (2) agrees, without the Bank first having to proceed against Debtor or to liquidate any security, to pay on demand all sums due and to become due or incurred by Bank by reason of Debtor's default. . . .

Hope's guaranty provides:

> The undersigned Guarantor(s) hereby requests

> the Lender to give and continue to give the above named Customer(s) credit, and in consideration for any credit given, the undersigned Guarantor hereby absolutely and unconditionally guarantees payment, on demand without Lender first . . . or without the Liquidation of any collateral securing said indebtedness. Guarantor . . . guarantees payment of any and all existing and future indebtedness and liabilities of every kind, including all renewals, extensions, and modifications thereof from Customer(s) to Lender, however and whenever created or arising, or evidenced, or acquired. . . . This guaranty shall be absolute, unconditional, continuing and binding upon the estate of the undersigned Guarantor.

The guaranties are absolute and unconditional guaranties of payment. *Compare Abbott v. National Bank of Commerce,* 56 P.2d 886, 887 (Okla. 1936) ("I do hereby guarantee the payment of said note. . . ."); *Walker v. McNeal,* 272 P. 443, 446-47 (Okla. 1928) ("We . . . do hereby guarantee payment. . . ."); *Walker v. McNeal,* 269 P. 295, 296-97 (Okla. 1928) (Same). OKLA. STAT. tit. 15, § 332 provides:

> A guarantor of payment or performance is liable to the guarantee upon the default of the principal, and without demand or notice.

Thus, FSLIC is entitled to seek remedies immediately and independently from both Sooner and the Patners until the debt is satisfied. *Walker,* 269 P. at 297. The only limitation upon each Partners' liability is in the amount of:

> Ten percent (10%) (plus closing costs estimated at $5,000.00) of original loan of Two Hundred Fourteen Thousand Two Hundred Dollars and no/100 cents ($214,200.00) on Vista Towers Condominium.

In a suit brought upon a guaranty such as this, a prima facie case is established by proof of the original indebtedness, the debtor's default and the existence of the guaranty. *FDIC v. Meyer,* 781 F.2d 1260, 1267 (7th Cir. 1986); *Juzwik v. Juzwik,* 448 N.E.2d 1319, 1322 (Ill. App. 1986); *Mid-City Industrial Supply Co. v. Horwitz,* 476 N.E.2d 1271, 1277 (Ill. App. 1985).

FSLIC has demonstrated the amount of indebtedness, Sooner's default and the terms of the Partners' guaranties. The Partners' guaranties clearly cover Sooner's indebtedness. The note is due in its entirety and the Partners are liable to Victor for the amount of principal and interest owed by Sooner, up to the limits fixed by their guaranties.

B. *THE DEFENSES RAISED BY THE PARTNERS AND HOPE ARE INSUFFICIENT AS A MATTER OF LAW*

The Partners allege two defenses:

(1) Release; and

(2) Novation.

Hope asserts:

(1) Novation;

(2) Lack of certain formalties:

(3) Change in the underlying obligation; and

(4) Rescission of his partnership interest.

The Partners assert that when they sold their partnership interests, Victor Federal implied or expressly recognized that fact and agreed to release or did release them from liability. This defense is unsupportable. The Partners were not released form liability on the note simply

because they retired from the partnership. *Holland Reno Manufacturing Co. v. Homeland Music Co.*, 283 P. 235 (Okla. 1929); *Ellet-kendall Shoe Co. v. Miller*, 215 P. 417 (Okla. 1923). They could be released only by an agreement to that effect with Victor Federal. No such agreement, if it existed, is embodied in any writing and nothing in the files of Victor indicates that the Partners' guaranties were released. Consequently, as a matter of federal common law, the Partners are estopped from asserting that they have been released.

It has long been the rule that federal common law prevents and estops those who execute and deliver promissory notes and/or guaranties to federally insured banks from raising defenses against a bank's duly appointed receiver based on oral agreements with officers of failed banks. *See, e.g., D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942). As stated by the Supreme Court in *D'Oench Duhme*, the underlying policy for such a rule is:

> To protect [the FDIC] and the public fund which it administers against misrepresentation as to securities or other assets in the portfolios of the banks which [the FDIC] insures or to which it makes loans.

315 U.S. at 457. *See FDIC v. Van Laanen*, 769 F.2d 666, 667 (10th Cir. 1985). The principle established in *D'Oench Duhme* is necessary to ensure the smooth and efficient administration of an insolvent bank by its insured without unnecesssary disruption or panic. *FSLIC v. Hsi*, 657 F. Supp. 1333, 1338 (E.D. La. 1986). The principle also allows the FSLIC and the Federal Deposit Insurance Corporation ("FDIC") to rely on the records of insolvent banks in appraising the worth and collectibility of the failed bank's assets. *FDIC v. Powers*, 576 F. Supp. 1167, 1171 (N.D. Ill.

1983), *aff'd*, 753 F.2d 1076 (1984). It reaches all instruments where the "maker lent himself to a scheme or arrangement whereby the banking authority on which [FDIC] relied in insuring the bank was or was likely to be misled." *D'Oench Duhme*, 315 U.S. at 460.

The principle announced in D'Oench Duhme has been codified by statute for cases in which the FDIC has acquired bank assets in its corporate capacity. *See* 12 U.S.C.A. § 1823(e).[2] Although § 1823(e), by its own terms only applies to the FDIC acting in its corporate capacity, the rule announced in D'Oench Duhme is applicable to the FSLIC, as well as the FDIC, while acting in its capacity as receiver for a failed institution. *Firstsouth, F.A. v. Aqua Constr. Inc.*, 858 F.2d 441, 442-43 (8th Cir. 1988); *FDIC v. Van Laanen*, 769 F.2d 666 (10th Cir. 1985); *Dill v. FSLIC*, 678 F. Supp. 1404 (E.D. Ark. 1988); *FSLIC v. Lefeve*, 676 F. Supp. 764 (S.D. Miss. 1987); *FSLIC v. Hsi*, 657 F. Supp. 1333 (E.D. La. 1986). Cases decided under § 1823(e) have been deemed persuasive authority in construing *D'Oench Duhme* in actions brought on behalf of the FSLIC in its capacity as receiver. *Firstsouth*, 858 F.2d at 443. It has also been held that the common law rule in *D'Oench*

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[2] 12 U.S.C.A. § 1823(e) provides:

> No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been continuously, from the time of its execution, an official record of the bank.

Duhme and its statutory counterpart should be treated consistently as they are both founded on the same policy and concerns. *Hsi,* 657 F.Supp. at 1338; *Lefeve,* 676 F. Supp. at 768. *See also* Garn-St. Germain Depository Institution Act of 1982, S. Rep. No. 536, 97th Congress, 2nd Session, *reprinted* 1982, U.S. Code Cong. and Ad. News, 3054 (FSLIC and FDIC have parrallel authority over their respective institutions).

D'Oench Duhme and its statutory counterpart, § 1823(e), have been broadly interpreted over the years in striking down various defenses raised by bank obligors, including lack of consideration, fraudulent inducement and breach of fiduciary duty to ensure that the FSLIC and the FDIC are able to administer the affairs of insolvent financial institutions in the most efficient and undisrputed manner possible. *See, e.g., FSLIC v. Murray,* 853 F.2d 1251 (5th Cir. 1988); *FDIC v. Venture Contractors, Inc.,* 825 F.2d 143 (7th Cir. 1987); *FDIC v. Langley,* 792 F.2d 541 (5th Cir. 1986) *aff'd* 108 S. Ct. 396 (1987); *FDIC v. Armstrong,* 784 F.2d 741 (6th Cir. 1986); *FDIC v. Investors Associates X., Ltd.,* 775 F.2d 152 (6th Cir. 1985); *FDIC v. Van Laanen,* 769 F.2d 666 (10th Cir. 1985); *FSLIC v. Dillon Constr. Co.,* 681 F. Supp. 1359 (E.D. Ark. 1988); *FDIC v. TWT Exploration Company,* 626 F. Supp. 149 (W.D. Okla. 1985); *FDIC v. Powers,* 576 F. Supp. 1167 (N.D. Ill. 1983), *aff'd,* 753 F.2d 1076 (1984). Even agreements made in good faith with a bank prior to the appointment of a receiver have been struck down under the *D'Oench Duhme* doctrine. *See FDIC v. Investors Associates X. Ltd.,* 775 F.2d 152 (6th Cir. 1985). Some courts have broadly construed *D'Oench Duhme* to hold that the FDIC and FSLIC take notes free of all personal defenses. *See, e.g., FDIC v. Wood,* 758 F.2d 156 (6th Cir. 1985).

D'Oench Duhme and its progeny have firmly

embedded in the federal common law the principle that the FSLIC and the FDIC "should not be bound by *anything* outside of banks' loan documents" when it acts as a receiver for a failed financial institution. *FDIC v. MM&S Partners,* 626 F. Supp. 681, 687 (N.D. Ill. 1985) (emphasis added). *See also Gunter v. Hutcheson,* 674 F.2d 862 (11th Cir. 1982), *cert. denied,* 459 U.S. 826 (1982), *reh. denied,* 459 U.S. 1059 (1982); *Lupin v. FSLIC,* No. 85-5896 1987 U.S. Dist. Lexis 5090 (E.D. La. 1987). In *MM&S* the court stated:

> The policy supporting FDIC protection in collateral agreement situations applies equally to all situations in which the makers defense is based on something, representations or conduct, outside of the note itself.

MM&S 626 F. Supp. at 687. The court in *MM&S* concluded that the collateral agreement between the defendant and the bank regarding payment dates and amounts could not be used as a defense to the FDIC's action to enforce the note, notwithstanding the fact that the FDIC had knowledge of the collateral agreement or the fact that the defendant made the collateral agreement in good faith. *See also FDIC v. Investors Associates X. Ltd.,* 775 F.2d 152 (6th Cir. 1985).

In *FDIC v. Galloway,* 856 F.2d 112 (10th Cir. 1988), the guarantors alleged, as a defense to the action to enforce the guarantees, that the bank president fraudulently induced them into executing the guarantees by orally assuring them that previous notes of the primary obligor had been paid off, when they actually had not, and also by the president's oral promise to establish a $50,000.00 escrow account to help cover the first payments on the new note which the guarantors guaranteed. The court relied on

D'Oench Duhme and 12 U.S.C. § 1823(e) in finding that the guarantor was estopped from asserting fraud in the inducement as a defense. *See also Firstsouth F.A. v. Aqua Constr. Inc.*, 858 F.2d 441 (8th cir. 1988); *FDIC v. P.L.M. International, Inc.*, 834 F.2d 248 (1st Cir. 1987); *FDIC v. Cardinal Oil Well Servicing Co.*, 837 F.2d 1369 (5th Cir. 1988); *FDIC v. Venture Contractors Inc.*, 825 F.2d 143 (7th Cir. 1987); *Public Loan Co. v. FDIC*, 803 F.2d 82 (3rd Cir. 1986); *FDIC v. Castle*,781 F.2d 1101 (5th Cir. 1986); *FDIC v. Wood*, 758 F.2d 156 (6th Cir. 1985); *FDIC v. Waldron*, 630 F.2d 239 (4th Cir. 1980); *FSLIC v. Port Allen Development Corp.*, 684 F. Supp. 439 (N.D. La. 1988).

In this case, there is no document which embodies the alleged release of the Partners from liability under the note or their guaranties. *D'Oench Duhme* applies directly to these circumstances and estoppes Defendants from asserting the defense of release.

2. *NOVATION (THE PARATNERS AND HOPE):*

The Partners and Hope argue that the revised note constitutes a novation. A novation is the substitution for and extinguishment of an old obligation by a new obligation. *Cardwell Investment Co. v. United Supply & Manufacturing Co.*, 268 F.2d 857, 859 (10th Cir. 1959). In every novation there are four essential elements:

(1) A previous valid obligation;

(2) The agreement of all the parties to the new obligation;

(3) The extinguishment of the obligation; and

(4) A valid new obligation.

Erwin v. Breese, 109 P.2d 507, 509 (Okla. 1940). A novation may be effected in three ways:

> (1) By the substitution of a new obligation between *the same parties*, with intent to extinguish the old obligation;
>
> (2) By the substitution of a *new debtor* in the place of the old one, with intent to release the latter;
>
> (3) By the substitution of a *new creditor* in the place of the old one, with intent to transfer the rights of the latter to the former.

State ex rel. Commissioners v. Pitts, 172 P.2d 923, 925 (Okla. 1946).

The Supreme Court of Oklahoma has consistently held that the mere giving of a new note for an obligation under a prior note does not discharge the liability on the prior note, unless the new note is given with the understanding on the part of both the maker of the new note and the holder of the prior note. *Cravens v. First State Bank*, 355 P.2d 1025, 1026 (Okla. 1960) The presumption is that the old obligation is not extinguished by the new. *Oil Field Gas Co. v. International Supply Co.*, 102 P.2d 91, 92 (Okla. 1940).[3] Finally, pursuant to the Oklahoma Uniform Partnership Act, it is permissible for any partner (Biffle) to enter into a separate obligation (the revised note) to per-

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[3] *See also, First National Bank & Trust Co. v. Daniel*, 701 F.2d 141, 142 (11th Cir. 1983); *In re Lambert Enterprises, Inc.*, 21 Bankr. 529, 530 (W.D. Va. Bankr. 1982); *Taines v. Capital City First National Bank*, 344 S.2d 273 (Fla. App. 1977); *Farmers Union Oil Co. v. Fladeland*, 178 N.W.2d 254, 257 (Minn. 1970); *First Pennsylvania Bank, N.A. v. Triester*, 380 A.2d 826, 830-31 (Penn. Super. 1977); *Wenzel v. Conrad Schmitt Studios*, 11 N.W. 2d 503, 505 (Wis. 1943).

form a partnership contract (the note). OKLA. STAT. tit. 15, § 215; *In re Fowler,* 407 F. Supp. 799, 806 (W.D. Okla, 1975); *Mandan Security Bank v. Heinsohn,* 320 N.W. 2d 494, 498 (N. Dak. 1982).

In this case, there was not agreement pursuant to which the "new obligation" was substituted for and extinguished the "old." Pursuant to *D'Oench Duhme*, such an agreement must be in writing in order to bind the FSLIC as receiver for Victor. None exists. Indeed, Victor Federal's records are entirely inconsistent with the idea of novation. The note was not marked "Paid" or otherwise cancelled.[4] Victor Federal's books do not reflect a cancellation of the note. No new funds were disbursed pursuant to the revised note; it simply restated the terms under which the proceeds paid pursuant to the note were to be repaid. The mortgage given on the note secures the revised note. There is no evidence which shows that all the parties to the note and the Partners' and Hope's guaranties agreed to the acceptance of the revised note as an extinguishment of the note. Under such circumstances, their alleged defense is invalid. *Fuller v. Stout,* 166 P. 898 (Okla. 1917); *Martin v. Leeper,* 149 P. 1130, 1141 (Okla. 1915); *Shiflet v. Marley,* 118 P.2d 1107, 1109-10 (Ariz. 1941); *Alton Banking & Trust Co. v. Schweitzer,* 460 N.E.2d 105, 108-09 (Ill. App. 1984); *First National Bank & Trust Co. v. Meyer Enterprises, Inc.,* 427 N.W. 2d 328, 330 (N. Dak. 1988).

3. *LACK OF FORMALTIES (HOPE)*

Hope argues that his guaranty is unenforceable because it is not witnessed, notarized or dated. In general, Oklahoma follows the common rule that a guaranty need not be expressed in any particular form. *Ross v. Russell,*

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[4] *See* OKLA. U.C.C. § 3-602.

475 P.2d 152, 154 (Okla. 1970). Because it is a type of contract, the rules that generally apply to the embodiment of a contract in writing apply to guaranties, unless otherwise stated in statute or case law. 38 C.J.S. *Guaranty* § 18.

No case has been found in which the presence of a date, witness or notary signature has been required on a guaranty. On the other hand, it has been held that the fact that a guaranty agreement is *not* dated when executed is immaterial, because no date is essential to its validity. *Eastman Oil Well Survey Co. v. Hamil*, 416 S.W.2d 597, 604 (Tex. Civ. App. 1967). Nor is the witnessing or notarization of a guaranty a prerequisite to its validity. "In the absence of a mandatory statute, an acknowledgment is not necessary to the validity of an instrument." *Germany v. Murdock*, 662 P.2d 1346, 1348 (N. Mex. 1983). There is no statutory requirement in Oklahoma that a guaranty be acknowledged or witnessed. In fact, even a deed is effective between the parties although it is not acknowledged. OKLA. STAT. tit. 16, 15. Here, Hope has admitted signing the guaranty; the lack of a witness or notarization is immaterial.

4. *CHANGE IN THE UNDERLYING OBLIGATION (HOPE)*

Hope argues that he is discharged from liability pursuant to OKLA. STAT. tit. 15 § 338 on the guaranty because the underlying obligation — the note — was altered. This position is untenable for two reasons. First, the underlying obligation was not altered. the note is still a valid obligation, as discussed above. Second, Hope's alleged defense ignores the fact that a guarantor can agree by the terms of his guaranty to alterations of the underlying agreement. Indeed, they typically do. In *Ford Motor Credit v. Milburn*, 615 F.2d 893 (10th Cir. 1980) (ap-

plying Oklahoma law), the defendants waived their ability to defend on the basis of § 338 because their guaranty contained a promise to pay all existing and future debts, the recital of consideration referred to future dealings, and they waived notice of dealings between the primary obligor and the guarantee. *See also Black v. O'Haver,* 567 F.2d 361 (10th Cir. 1977) (applying Oklahoma law; defendants not exonerated by amendment of loan agreement because their guaranty permitted "any amendment or modification"). 567 F.2d at 369.

Hope's guaranty as discussed *supra* at pp. 8-10 is continuing and unconditional and, pursuant to the terms of the Guaranty, Hope has consented to all "renewals, extensions and modifications" of the obligation. Consequently, Hope has consented to any alleged alteration of the indebtedness and thus cannot assert, as a matter of law, that he has been exonerated from liability.

5. RESCISSION OF PARTNERSHIP INTEREST (HOPE)

Finally, Hope raises the defense that he is rescinding his partnership interest. However, such rescission has no effect upon his liability to third parties such as FSLIC. Clearly a partner is not released from partnership obligations simply because he retires from the partnership, even if the remaining partners continue the business and assume the obligation among themselves. *Holland Reno Manufacturing Co. v. Homeland Music Co.,* 382 P. 235 (Okla. 1929); *Ellet-Kendall Shoe Co. v. Miller,* 215 P. 417 (Okla. 1923). More significantly, Hope's guaranty is a collateral obligation independent and separately enforceable from that of the principal debtor. *Riverside National Bank v. Manolakis,* 613 P.2d 438, 441 (Okla. 1980). Thus, the status of Hope's relationship, if any, to the Partnership is

irrelevant to his relationship to FSLIC. Regardless of his attempt to rescind his partnership interest, FSLIC is entitled to enforce the guaranty agreement executed by Hope.

Based on the facts and authorities set forth above, there are no genuine issues of material fact involved in the instant case and the FSLIC as receiver for Victor is, therefore, entitled to a judgment as prayed for in the Petition.

Respectfully submitted,

HALL, ESTILL, HARDWICK,
GABLE, GOLDEN & NELSON, P.C.

By /s/ R. Mark Petrich

William D. Nay, OBA #6588
R. Mark Petrich, OBA #11956
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2700

ATTORNEYS FOR FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION IN ITS CAPACITY AS RECEIVER FOR PLAINTIFF VICTOR SAVINGS AND LOAN ASSOCIATION

ITEM # 5

COURT MINUTE

MOTION DOCKET

September 6, 1989. *C-85-371.* Before the Honorable Sam C. Fullerton, District Judge.

VICTOR SAVINGS & LOAN ASSOC. vs. SOONER VISTA, MIKE BARNETT, JIM BIFFLE, et al. Motion for summary Judgment. Motion for default judgment. Mark Petrick, Attorney appeared for plaintiff. David Nestor, attorney appears for defendants. Motion for Summary Judgment sustained, adopted agreement and authority set out in brief.

ITEM #6

IN THE DISTRICT COURT OF DELAWARE COUNTY
STATE OF OKLAHOMA

FILED
SEPT 15 1989

VICTOR SAVINGS AND LOAN ASSOCIATION,	)	
Plaintiff,	)	
vs.	)	No. C-85-371
SOONER VISTA, (a/k/a Sooner Vista Partnership) an Oklahoma general partnership; MIKE BARNETT, (individually, and as partner of Sooner Vista); JIM H. BIFFLE, (individually and as partner of Sooner Vista); JOHN R. HELTON (individually and as partner of Sooner Vista); JEFF L. HIRZEL (individually and as partner of Sooner Vista); JAMES W. LITTLE (individually and as partner of Sooner Vista); KENNETH E. MILLER (individually and as partner of Sooner Vista); PHILLIP E. SNODDY (individually and as partner of Sooner Vista) MARVIN L. WYNN (individually and as partner of Sooner Vista); JOHN STEPHEN HOPE (individually and as partner of Sooner Vista);	)	

COUNTY TREASURER OF DELAWARE COUNTY: BOARD OF COUNTY COMMISSIONERS OF DELAWARE COUNTY,	)
Defendants.	)

DEFENDANTS HIRZEL, LITTLE, HELTON, WYNN, SNODDY, BARNETT AND MILLER'S MOTION TO RECONSIDER. COURT'S GRANTING OF FSLIC'S SUMMARY JUDGMENT MOTION

The Defendants, Jeff L. Hirzel, James W. Little, Mike Barnett, John R. Helton, Phillip E. Snoddy, Marvin L. Wynn, and Kenneth E. Miller (collectively referred to as "These Defendants") move this Court, pursuant to Okla. Stat. tit. 12 §651, for a new trial or reconsideration of this Court's granting of the Federal Savings And Loan Insurance Corporation ("FSLC") Motion for Summary Judgment for the following reasons:

1. On September 6, 1989, this Court granted judgment in favor of the FSLIC against These Defendants as well as the Defendants John Steven Hope and Jim Biffle. The Court also granted judgment against Sooner Vista Partnership and a Decree of Foreclosure permitting the sale of a certain condominium given as security for the Sooner Vista Indebtedness.

2. These Defendants request that the Court reconsider its judgment as to their liability as partners and guarantors of the Sooner Vista indebtedness pursuant to Okla. Stat. tit. 12 §651(6) in that this Court's decision is not sustained by sufficient evidence and is contrary to law.

WHEREFORE, these Defendants move this Court for an order denying the FSLIC's Motion for Summary Judgment as to their liability as partners and guarantors of the Sooner Vista indebtedness.

Respectfully submitted,

/s/ Joal R. Hogue

Gene C. Buzzard, OBA #1396
Joel R. Hogue, OBA #11351

GABLE & GOTWALS, P.C.
2000 Fourth National Bank Building
15 West Sixth Street
Tulsa, Oklahoma 74119-1217

ATTORNEYS FOR DEFENDANTS JEFF L. HIRZEL, JAMES W. LITTLE, MIKE BARNETT, JOHN R. HELTON, PHILIP E. SNOODY, MARVIN L. WYNN AND KENNETH E. MILLER

ITEM #7

IN THE DISTRICT COURT OF DELAWARE COUNTY
STATE OF OKLAHOMA

FILED
Oct 3 89

VICTOR SAVINGS AND LOAN ASSOCIATION,	)	
Plaintiff,	)	
vs.	)	No. C-85-371
SOONER VISTA, (a/k/a Sooner Vista Partnership) an Oklahoma general partnership; MIKE BARNETT, (individually, and as partner of Sooner Vista); JIM H. BIFFLE, (individually and as partner of Sooner Vista); JOHN R. HELTON (individually and as partner of Sooner Vista); JEFF L. HIRZEL (individually and as partner of Sooner Vista); JAMES W. LITTLE (individually and as partner of Sooner Vista); KENNETH E. MILLER (individually and as partner of Sooner Vista); PHILLIP E. SNODDY (individually and as partner of Sooner Vista) MARVIN L. WYNN (individually and as partner of Sooner Vista); JOHN STEPHEN HOPE (individually and as partner of Sooner Vista);	)	

COUNTY TREASURER OF DELAWARE COUNTY: BOARD OF COUNTY COMMISSIONERS OF DELAWARE COUNTY,

Defendants.

RESPONSE AND OBJECTION TO DEFENDANTS' MOTION TO RECONSIDER COURT'S GRANTING OF FSLIC'S SUMMARY JUDGMENT MOTION

The Federal Savings and Loan Insurance Corporation ("FSLIC") as receiver for Victor Savings and Loan Association ("Victor") submits this Response and Objection to the Motion to Reconsider this Court's Granting of the FSLIC's Motion for Summary Judgment which was filed herein on September 15, 1989, by the Defendants Jeff L. Hirzel, James W. Little, Mike Barnett, John R. Helton, Phillip E. Snoddy, Martin L. Wynn and Kenneth E. Miller (referred to collectively hereinafter as the "Defendants").

I.

INTRODUCTION

On July 14, 1989, the FSLIC as receiver for Victor filed its Motion for Summary Judgment against the Defendants and all other parties involved in this action. The FSLIC as receiver for Victor incorporates herein by reference its Brief in Support of Motion for Summary Judgment. On or about August 15, 1989, the Defendants filed a Response to the FSLIC's Motion for Summary Judgment. Said response of the Defendants was filed after Defendants requested and obtained a continuance of the hearing on the FSLIC's Motion for Summary Judgment

and an extension in which to file Defendants' response. The FSLIC as receiver for Victor consented to said extension and continuance, thus allowing Defendants to fully and completely respond to the FSLIC's Motion for Summary Judgment.

On September 6, 1989, a hearing was conducted by this Court and, after hearing extensive arguments from counsel of the FSLIC as receiver for Victor and the counsel of the Defendants concerning the various claims and defenses involved in this action, this Court granted the FSLIC's Motion for Summary Judgment in its entirety.

In their Motion to Reconsider, the Defendants assert that this Court's decision "is not sustained by sufficient evidence and is contrary to law" and attempt to persuade this Court that the FSLIC's Motion for Summary Judgment should not have been granted because the Defendants assert:

(1) a question of fact exists as to whether Defenddants' liability as general partners of Sooner Vista Partnership was limited to 10% each by the Defendants' execution of their respective guaranty agreement;

(2) a question of fact exists as to whether a novation occurred when Victor Federal Savings and Loan Association ("victor Federal") accepted the renewal note; and

(3) the Defendants were released from all liability by Victor Federal when Victor Federal released Royce Hammons from liability under his respective quaranty agreement (Defendants raise the third proposition in a "Supplement" to Defendants' Brief in Support of Motion to Reconsider filed herein).

As this Court is aware, arguments 1 and 3 above were not raised by Defendants in response to the FSLIC's Motion for Summary Judgment and the Defendants' rationale, arguments and points of authority in support of argument 2 above are likewise new and different than those raised by Defendants in response to the FSLIC's Motion for Summary Judgment.

It is fundamental that a party is not entitled to raise for the first time on a motion for new trial (or motion to reconsider) issues or arguments not previously raised at trial. As stated by the Oklahoma Supreme Court in *Patteson v. Myers,* 83 P.2d 846 (Okla. 1938):

> The failure of a party to avail himself of fair and reasonable opportunity to present and establish claim or defense will afford no basis for new trial in absence of exceptional facts excusing him.

Likewise, the Supreme Court in *Missouri, K. & T. Ry. Co. v. Taylor,* 170 P. 1148 (Okla. 1918) stated:

> A party is entitled to have his day in court; both parties are entitled to this, but neither party is entitled to have more than one fair, reasonable opportunity to establish his claim or defense. To allow more would be to protract litigation to the extent which would preclude the administration of justice.

See, also, Nolan v. Mathis, 272 P. 874 (Okla. 1928).

The Defendants in their Motion to Reconsider raise new arguments and authorities not previously presented in response to the FSLIC's Motion for Summary Judgment despite the fact that Defendants had a fair and reasonable

opportunity to present and establish all defenses and arguments prior to and at the time this Court ruled on the FSLIC's Motion for Summary Judgment. The Defendants have failed to allege any exceptional circumstances which would justify a second opportunity for the Defendants to respond to FSLIC's Motion for Summary Judgment. Consequently, this Court, as a matter of law, should not consider the arguments and authorities raised by Defendants in their Motion to Reconsider!

Nevertheless, as the following illustrates, the new arguments raised by the Defendants in their Motion to Reconsider in an attempt to resist the FSLIC's Motion for Summary Judgment fail as did the arguments and authorities that were raised by Defendants in response to the FSLIC's Motion for Summary Judgment and at the hearing on the FSLIC's Motion for Summary Judgment.

II.

DEFENDANTS' LIABILITY FOR THE DEBT OF SOONER VISTA PARTNERSHIP WAS NOT LIMITED BY THE EXECUTION OF THE GUARANTY AGREEMENTS

Defendants in their Motion to Reconsider assert that multiple contracts involving substantially one transaction must be construed together and that "the only logical and reasonable interpretation of" the promissory note from Sooner Vista Partnership and the guaranty agreements by the Defendants is that all parties intended that the Defendants would only be liable for 10% of the outstanding indebtedness of Sooner Vista Partnership. In support of this argument, the Defendants present two letters signed by Jim H. Biffle ("Biffle"), a general partner with the Defendants, which set forth Biffle's representations to the Defend-

ants that they would only be liable for 10% of the outstanding balance.[1]

The law in Oklahoma is unequivocal that a general partner is jointly liable for all debts and obligations of the partnership. *See* 54 O.S. § 215. There are no exceptions at law to this general rule and it is fundamental that a limited partnership is the appropriate mechanism in which a partner can limit his liability for the debts and obligations of a partnership in which he is a member. *See* 54 O.S. § 148.

The Defendants' argument that the guaranty agreements executed by the Defendants limited their liability to 10% of Sooner Vista Partnership's obligations to Victor Federal is not supported by any legal principle or authority. There is simply no document or agreement executed by Victor Federal that would legally act to limit each of the Defendants' liability to 10%. As set forth in the FSLIC's Brief in Support of its Motion for Summary Judgment and as found by this Court at the hearing on September 6, 1989, *D'Oench, Duhme & Co. v. FDIC,* 315 U.S. 447 (1942), and its progeny estop Defendants from asserting that their liability to the FSLIC is limited since there are no written documents contained in the files of Victor Federal and/or Victor which limit the liability of the Defendants as general partners of Sooner Vista Partnership.

Although Defendants may have been "seeking a mechanism to limit [their] liability" (see Defendants' Brief in Support of their Motion to reconsider), such mechanism

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[1] The letters executed by Biffle were not submitted in response to FSLIC's Motion for Summary Judgment, but more importantly Defendants have never presented any document signed by Victor Federal which purports to limit Defendant's liabaility to 10% of the indebtedness.

was, unfortunately, not properly effectuated by the Defendants. If the Defendants desired to limit their liability in connection with the obligations of Sooner Vista Partnership, the Defendants should have formed a limited partnership and not a general partnership. Contrary to the Defendants' contentions, the FSLIC as receiver for Victor, and the public fund in which it insures, should not suffer a loss on its assests simply because the Defendants claim that they failed to structure Sooner Vista Partnership in a manner consistent with the representations of their partner. Biffle.

III.

THE ACCEPTANCE BY VICTOR FEDERAL OF THE RENEWAL NOTE DOES NOT GIVE RISE TO A NOVATION UNDER OKLAHOMA LAW

Defendants assert in their Brief in Support of Motion to Reconsider that there is a question of fact as to whether a novation occurred when Victor Federal accepted the renewal note. Defendants assert that the validity of the defense of novation turns on the intent of the parties and claim that the FSLIC has presented no evidence that the old indebtedness was *not* satisfied through the excution and acceptance of the renewal note. Defendants also argue that D'Oench, Duhme and its progency does not apply to estop them from asserting the defense of novation herein since the Defendants assert that they are not seeking to diminish the right of the FSLIC to recover the assets of Victor and since the "issue of novation" cannot be answered by reference to the bank's records one way or the other" (See Defendants' Brief in Support of Motion to Reconsider, p. 5).

Defendants in their Brief in Support of Motion to

Reconsider correctly acknowledge that an essesntial element of establishing the defense of novation is showing that the old debt was "extinguished." *See, e.g., Cardwell Investment Company v. United Supply & Manufacturing Company,* 268 F.2d 857 (10th Cir. 1959). It is fundamental that the law limits the manner in which a written promissory note can be extinguished and in which a party can be released from liability thereon. *See generally,* 12(A) O.S. §§ 3-601 -3-606; 15 O.S. § 233. As a general proposition, any such release, absent satisfaction in full or some wrongful act by the holder, must be in writing and signed by the holder thereof. The most common method for extinguishing a promissory note is by marking the original note "Paid" and/or returning said original document to the maker. *See* 12(A) O.S. § 3-605. As this Court found at the hearing on September 6, 1989, the mere acceptance of a renewal promissory note or subsequent note by a holder of a note does not act as an extinguishment or release of the original note under Oklahoma law. *See* cases cited in the FSLIC's Brief in Support of Motion for Summary Judgment at p. 15.

It is undisputed that there is not a written document which purports to extinguish the original note or release the Defendants from liability thereof. Contrary to Defendants' argument, the FSLIC has presented evidence that the original note has not been extinguished. Namely, the original note has never been marked "Paid" or returned to Sooner Vista Partnership or otherwise extinguished pursuant to the requirements imposed by 12(A) O.S. §§ 3-601 - 3-606 or 15 O.S. § 237. Furthermore, contrary to Defendants' argument, the loan files maintained by Victor Federal and Victor are quite clear. There are two promissory notes and nine guaranty agreements in connection with the subject loan, all of which represent assets that the FSLIC succeeded to upon its appointment as receiver for Victor.

There are no ambiguities as to what said loan documents represent.

Notwithstanding the foregoing, the Defendants insist that they should be allowed to conduct a trial and put on evidence in an attempt to establish that the original note was extinguished and a novation occurred when Victor Federal accepted the renewal note. It is unknown to the FSLIC what evidence the Defendants would present to a jury in support of their claim that the original note was extinguished since Defendants have yet to submit or designate any evidence whatsoever other than the renewal note.[2] It is undisputed that there are no written documents contained in the loan files of Victor Federal that evidence Defendants' contention that the original note was extinguished by Victor Federal.

As this Court found on September 6, 1989, the Defendants are estopped pursuant to D'Oench, Duhme and its progeny from asserting defenses in this action that are based on representations or conduct not evidenced by the loan documents themselves. In their Motion to Reconsider, the defendants rely on two cases out of the District Court of Puerto Rico for the proposition that *D'Oench Duhme* is inapplicable herein since Defendants are not attempting to diminish the rights of the FSLIC.[3] The *Prann* and *Rivera-Arroyo* cases cited by the Defendants are distinguishable

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[2] Pursuant to Rule 13 of the Rules of the District Court of Oklahoma, Defendants, in response to FSLIC's Motion for Summary Judgment, have the burden of "showing evidence, not mere contentions which would justify a trial." *See, e.g., American National Bank v. Clarke & Van Wagner, Inc.*, 692 P.2d 61 (Okla. App. 1984). Defendants have yet to present any such evidence.

[3] Defendants rely on the cases of *FDIC v. Prann*, 694 F. Supp. 1027 (D.P.R. 1988) and *FDIC v. Rivera-Arroyo*, 645 F. Supp. 511 (D.P.R. 1986).

from the case at bar and, moreover, are simply not applicable herein.

In *Prann*, the defendant, in defense to the action by the FDIC to enforce a promissory note, alleged that he had been released from liability pursuant to 30 L.P.R.A. § 2560 since a third party had purchased the subject property with the "tacit" consent of the lender. The statute relied upon by the defendants in *Prann* provides in relevant part:

> When a mortgaged property is sold and the seller and the purchaser should have agreed that the buyer shall subrogate himself not only with respect to the liabilities derived from the mortgage but also with respect to the personal obligations secured therein, the seller shall be released from said obligations, if the creditor gives his express or *tacit consent* (emphasis added).

"Tacit consent" is that which is implied or inferred through actions. See Black's Law Dictionary. The foregoing statute is unique to Puerto Rico and there is no similar statute in Oklahoma. The court in *Prann* determined that the bank did in fact give "tacit" consent since the bank accepted payment from the new buyer and engaged in a series of internal transactions of crediting and closing accounts which indicated that the Bank looked to the third party purchaser for repayment. Although the court in *Prann* found that the defendant had been released from liability under the foregoing statute, it is important to note that the court recognized that the facts alleged by the defendant did not give rise to or constitute a defense of novation. The other case cited by Defendants, *Rivera-Arroyo*, involves the same statute set forth above.

The court in *Prann*, in reliance on *FDIC v. Nemecek*,

641 F. Supp. 740 (D. Kan. 1986), held that *D'Oench Duhme* and 12 U.S.C. § 1823(e) was inapplicable because:

> [T]he debt which forms the basis of the asset claimed by FDIC was satisfied *before* FDIC acquired the bank's assets.

The court in *Prann* reasoned that the Defendants were released from their obligation pursuant to the above referenced statute due to the bank's tacit consent and since such release occurred prior to the FDIC's acquisition of the bank, the FDIC did not receive said asset. The rationale of *Nemecek* and *Prann* is suspect and not applicable herein.[4]

Two years after the District Court of Kansas ruled in *Nemecek,* the District Court of Kansas in *FDIC v. Cover,* 714 F. Supp. 455 (D. Kan. 1988), rejected the rationale set forth in *Nemecek* and *Prann* since the court found that such rationale:

> [R]equires the court to, in a preliminary step, look to evidence not permitted by § 1823(e) to determine the FDIC's rights with respect to each item reflected in a failed bank's books as an asset and purchased by the corporation. Such a theory would destroy the effect and protection of § 1823(e) and hamper the FDIC's ability to follow the purchase and assumption alternatives by injecting uncertainty into the valuation of assets.

The court in *Cover* relied extensively on the United States Supreme Court opinion in *Langely* and the underlying

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[4] Although *Prann* was decided in 1988, the District Court of Puerto Rico oddly enough does not cite or rely on *Langley v. FDIC.*, 484 U.S. 86 (1987) which is the most recent construction of D'Oench, Duhme and 12 U.S.C. § 1823(e) by the United States Supreme Court.

policies of *D'Oench, Duhme* to reject the rationale set forth in *Nemecek* and *Prann. See also FDIC v. P.L.M. International, Inc.*, 834 F.2d 248 (1st Cir. 1987); *FDIC v. P.L.M. International, Inc.*, 834 F.2d 248 (1st Cir. 1987); *FDIC v. Hoover-Morris Enterprises*, 642 F.2d 785. (5th Cir. 1981).

As set forth above, there are no documents or evidence meeting the requirements of *D'Oench, Duhme* or 12 U.S.C. § 1823(e) which purport to extinguish the original note for purposes of establishing the defense of novation under Oklahoma law. As a result, the Defendants must be estopped from asserting that a novation occurred pursuant to *D'Oench, Duhme* and its progeny. The Defendants are simply attempting to go outside the loan documents, contrary to the well founded principle of *D'Oench, Duhme,* in an attempt to relieve themselves from liability. To allow Defendants to do such would wholly undermine and destroy the *D'Oench, Duhme* doctrine.

IV.

DEFENDANTS WERE NOT RELEASED FROM LIABILITY AS A RESULT OF THE EXECUTION OF THE SUBROGATION AGREEMENT BETWEEN VICTOR FEDERAL AND ROYCE HAMMONS

Defendants in their Supplement to their Brief in Support of Motion to reconsider assert that they were released by Victor Federal from all liability as a result of a certain Subrogation Agreement executed between Royce Hammons ("Hammons") and Victor Federal dated July 25, 1985. A copy of said Subrogation Agreement is attached hereto as Exhibit "A". In support of such argument, Defendants rely on the case of *Wade v. Tapp,* 285 P.2d 377

(Okla. 1955).[5] The purpose of the rule announced in *Tapp* is to preserve the right of contribution among joint obligors. The argument of the Defendants that the Subrogation Agreement releases them from all liability to the FSLIC fails since said agreement does not release Hammons as a general partner of Sooner Vista Partnership and since said agreement is not a true release but instead a substitution of liability under the guaranty.

The Subrogation Agreement between Hammons and Victor Federal provides in pertinent part:

> Victor hereby releases Hammons from all claims which might be asserted at any time from any and all obligations which are imposed upon Hammons in favor of Victor *pursuant to the guaranty recited above* and covenants that it will deliver to Hammons forthwith the originalguaranty executed by Hammons "Cancelled" and "Released" . . . (Emphasis added)

See Exhibit "A" attached hereto. As such, Victor Federal only released Hammons from liability as a guarantor and not as a general partner of Sooner Vista Partnership. Consequently, there was not a release of Hammons for the joint obligation that he may have with the Defendants which would act as a release of the Defendants under the law announced in *Tapp*.

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[5] The Oklahoma Supreme Court in *Tapp* applied the old common law rule that a release of one joint debtor releases all joint debtors in the absence of an express reservation of right to proceed against the other joint debtors. Although the Oklahoma Supreme Court has not had an opportunity to address said issue in recent years, the modern view adopted by most jurisdictions today is that a release of one joint debtor does not effect the liability of other joint debtors unless it is the intent of the parties to release all or if the injured party has received full compensation for his claim. *See generallly,* 66 AM. JUR.2d. *Release* § 35.

Moreover, the subrogation agreement is not a true release as contemplated by the Oklahoma Supreme Court in *Tapp*. Instead, the Subrogation Agreement provides for a substitution of obligors (i.e., Hope to take over the Hammons' liability under his respective guaranty agreement). The Subrogation Agreement simply does not affect Defendant's right to contribution against Hammons and/or his successor, Hope. Consequently, the Defendants' argument that they, as joint obligors with Hammons, have been released from all liability as a result of the Subrogation Agreement must fail as a matter of law.

Even in the event this Court somehow finds that the Subrogation Agreement acts as a release of Hammons as general partner of Sooner Vista Partnership and that said release also acts as a release of all joint obligors (i.e., the Defendants as general partners of Sooner Vista Partnership), the Defendants are still liable as guarantors of the debt of Sooner Vista Partnership pursuant to their respective limited guaranty agreements. It is fundamental that a guarantor is not released from liability under an unconditional and continuing guaranty agreement simply because a co-guarantor is released as long as consent to said release is given. *See, e.g., United States v. Vahlco Corp.*, 800 F.2d 462 (5th Cir. 1986).

Each guaranty executed by the Defendants is a separate and independent obligation and contract and each guaranty provides, in part:

> This guaranty shall be absolute, unconditional and continuing and shall be binding upon the undersigned, heirs of the undersigned, and the estate or estates of the undersigned, notwithstanding the death of any of the undersigned or of any guarantor or any other party liable upon

> any in debtedness or other obligation hereby guaranteed. *Any one or more of the undersigned or any party liable upon any indebtedness or other obligation hereby guaranteed may be released without effecting the liability hereunder of any of the undersigned or any other party not so release.* (Emphasis added).

As a result, the Subrogation Agreement does not affect the liability of the Defendants pursuant to their respective guaranty agreement in any way whatsoever. Each of the defendants' guaranty agreements are unconditional and are enforceable as separate instruments despite the fact that Victor Federal may have released Hammons from liability under his guaranty agreement.

V.

CONCLUSION

Based on the foregoing arguments and authorities, the Defendants' Motion to Reconsider this Court's Granting of the FSLIC's Motion for Summary Judgment should be denied.

Respectfully submitted,

HALL, ESTILL, HARDWICK,
GABLE, GOLDEN & NELSON, P.C.

By /s/ R. Mark Petrich

William D. Nay, OBA #6588
R. Mark Petrich, OBA #11956
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2700

ATTORNEYS FOR FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION IN ITS CAPACITY AS RECEIVER FOR PLAINTIFF VICTOR SAVINGS AND LOAN ASSOCIATION

ITEM 8

IN THE DISTRICT COURT OF DELAWARE COUNTY
STATE OF OKLAHOMA

FILED
11-13-89

VICTOR SAVINGS AND LOAN ASSOCIATION,	)	
Plaintiff,	)	
vs.	)	CASE NO. C-85-371
SOONER VISTA, (a/k/a Sooner Vista Partnership) and Oklahoma general partnership: et al.,	)	
Defendants.	)	

ORDER

The Defendants' Hirzel, Little, Helton, Wynn, Snoddy, Barnett, and Miller Motion to Reconsider the Court's granting of FSLIC's Motion for Summary Judgment and the Response thereto came on for hearing before said Court at its regular Motion Docket on November 1, 1989. The Defendants appear by their attorney, Joel R. Hogue, and the Plaintiff (Respondent) appears by its attorney, R. Mark Petrich.

Since the initiation of this action, Victor Savings and Loan Association was declared insolvent by the Federal Home Loan Bank Board and the Federal Savings and Loan

Insurance Corporation ("FSLIC") was appointed as Receiver.

This matter was heard before this Court on September 6, 1989, and at that time the Court granted judgment in favor of the FSLIC against Sooner Vista and also decreed the foreclosure of the real estate securing the indebtedness. In addition, the Court granted judgment against These Defendants, as well as John Steven Hope and Jim Biffle, for percentages of liability set forth in certain guaranty agreement executed by These Defendants and Hope and Biffle and, also granted judgment against These Defendants and Hope and Biffle for any indebtedness of Sooner Vista to the FSLIC that is not discharged through the sale of all partnership assets, most notably the condominium securing the indebtedness.

The Defendants maintain that the Court erred in granting judgment against These Defendants either as partners or as guarantors of the indebtedness for at least two reasons. First, the Court erred in failing to limit the liability of the partners to the percentages set forth in certain guaranty agreements because the obvious intention, as indicated by a proper interpretation of the writings executed by the parties, is that the guaranty agreements were executed for the purpose of limiting the individual partners' liability to the percentages set forth in their respective guaranty agreements. Second, there are material questions of fact remaining regarding whether the execution of a second promissory note by Jim Biffle operated as a novation which would have the effect of substituting Biffle, or the new Sooner Vista partnership composed of Biffle and Hope, for and in the place of These Defendants, who by that time were no longer partners in Sooner Vista.

In addition to the above, the Defendants maintain in a Supplement to their Brief in Support of the Motion to reconsider that Plaintiff's Motion for Summary Judgment should be denied for the further reason that one of the partners, Royce Hammons, was released from liability by Victor Federal Savings and Loan Association on January 14, 1985. They maintain that the Release by Victor of Hammons on his liability also constitutes a release of the other partners including These Defendants.

Both sides of all issues have been well briefed by counsel and the Court finds that further recitation of the facts is unnecessary. The facts are basically undisputed. The partners ("These Defendants") allege two defenses:

1. Release,

2. Novation,

in addition to the defense asserted above.

The Court in granting Plaintiff's Motion for Summary Judgment relied upon the doctrine established in the case of *D'Oench, Duhme & Company v. F.D.I.C.*, 315 U.S. 447 (1942), and 12 U.S.C.A. Section 1823(e). This principle prevents and estops those who execute and deliver promissory notes and/or guaranties to federally insured banks from raising defenses against a bank's duly appointed Receiver based on oral agreements with officers of failed banks.

The Court finds that based upon the D'Oench - Duhme Doctrine, the defenses raised by the partners are insufficient as a matter of law.

The Court further finds and reaffirms that there are

no substantial fact questions raised by the Defendants in their Motion to Reconsider that would justify submitting this case to a jury, and that by reason thereof, the Defendant's Motion to Reconsider should be denied.

The Court would further adopt the argument and authority of the Plaintiff in all of its briefs on file herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Defendant's Motion to Reconsider be and the same is hereby denied, to which ruling the Defendants are granted an exception.

DATED this 8th day of November, 1989.

/s/ Sam C. Fullerton

SAM C. FULLERTON
District Judge

CERTIFICATE OF MAILING

I hereby certify that I did mail a true and correct copy of the above and foregoing Order via prepaid first class mail on this 8th day of November, 1989, to the following interested parties, to-wit:

Mr. Joel R. Hogue, Attorney at Law, GABLE & GOTWALS, P.C., 2000 Fourth National Bank Building, 15 West Sixth Street, Tulsa, Oklahoma 74119-1217;

Mr. Robert Jenkins, Assistant District Attorney Delaware County Courthouse, Whitehead and Krause Streets, P. O. Box 309, Jay, Oklahoma 74346;

Mr. Jim Biffle, 7524 South Harvard Place, Tulsa, Oklahoma 74136;

Mr. James R. Hicks, Attorney at Law, MORRELL & WEST, 1717 South Boulder Street, Suite 800, Tulsa, Oklahoma 74119;

Mr. Dale F. McDaniel, 2250 East 73rd Street, Suite 200, Tulsa, Oklahoma 74136;

Mr. Mark Petrich, Attorney at Law, HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, 4100 Bank of Oklahoma Tower, One Williams Center, Tulsa, Oklahoma 74172.

/s/ Lynner L. Tomlin

ITEM #9

IN THE DISTRICT COURT OF DELAWARE COUNTY
STATE OF OKLAHOMA

FILED
JAN 3 1990

VICTOR SAVINGS AND LOAN ASSOCIATION,	)	
Plaintiff,	)	
vs.	)	No. C-85-371
SOONER VISTA, (a/k/a Sooner Vista Partnership) an Oklahoma general partnership; MIKE BARNETT, (individually, and as partner of Sooner Vista); JIM H. BIFFLE, (individually and as partner of Sooner Vista); JOHN R. HELTON (individually and as partner of Sooner Vista); JEFF L. HIRZEL (individually and as partner of Sooner Vista); JAMES W. LITTLE (individually and as partner of Sooner Vista); KENNETH E. MILLER (individually and as partner of Sooner Vista); PHILLIP E. SNODDY (individually and as partner of Sooner Vista) MARVIN L. WYNN (individually and as partner of Sooner Vista); JOHN STEPHEN HOPE (individually and as partner of Sooner Vista);	)	

COUNTY TREASURER OF DELAWARE COUNTY: BOARD OF COUNTY COMMISSIONERS OF DELAWARE COUNTY,

Defendants.

JOURNAL ENTRY OF JUDGMENT

This matter comes on for hearing this 6th day of September, 1989, on the Motion for Summary Judgment filed by the Federal Savings and Loan Insurance Corporation ("FSLIC") as receiver for Victor Savings and Loan Association ("Victor"), successor in interest to Victor Federal Savings and Loan Association ("Victor Federal"). The FSLIC as receiver for Victor appears by and through its attorneys, Hall, Estill, Harwick, Gable, Golden & Nelson, P.D., by R. Mark Petrich. The Defendants Jeff L. Hirzel, ("Hirzel"), James W. Little ("Little"), Mike Barnett ("Barnett"), John R. Helton ("Helton"), Phillip E. Snoddy ("Snoddy"), Marvin L. Wynn ("Wynn") and Kenneth E. Miller ("Miller"), appear by and through their attorneys of record, Gable & Gotwals, P.C., by Joel R. Hogue. The Defendant Charles J. Davis ("Davis") appears by and through his attorney Dale F. McDaniel. The Defendants Sooner Vista Partnership, Jim Biffle ("Biffle"), John Stephen Hope ("Hope") and Shangri-La Vista Towers Homeowners Association appear not. The Court, having heard oral arguments of counsel and being fully advised in the premises, finds that the Motion for Summary Judgment of the FSLIC as receiver for Victor should be sustained in its entirety and finds as follows:

1. That this Court has jurisdiction over the subject matter and the parties herein.

2. On or about May 13, 1983, Sooner Vista Partnership executed and delivered to Victor Federal a promissory note in the principal sum of $217,843.21 (the "Note").

3. On the date Sooner Vista Partnership executed and delivered the Note to Victor Federal, the partnership was made up of the following general partners, to-wit: Barnett, Biffle, Helton, Hirzel, Little, Miller, Snoddy, Wynn and Royce Hammons ("Hammons").

4. On May 13, 1983, Sooner Vista Partnership, for purposes of securing payment of the Note, executed and delivered to Victor Federal a certain mortgage in and to the following described real property, to-wit:

> Unit 1010 of Shangri-La Vista Towers, a unit ownership estate according to the recorded declaration and plan thereof, in an undivided 1.10% interest in and to the common elements and appurtenances thereto belonging, all according to and more particularly described and shown in the Declaration of Unit Ownership Estate and Bylaws of Shangri-La Vista Towers, recorded January 12, 1981, in Book 410, pages 138-163, inclusive, in the office of the County Clerk, Delaware County, Oklahoma.

5. On or about May 13, 1983, Barnett, Helton, Hirzel, Little, Miller, Snoddy, Wynn and Hammons executed and delivered to Victor Federal written guaranty agreements, whereby each of the said parties unconditionally guaranteed payment of 10% each of the original loan of $214,200 plus closing costs estimated to be $5,000. On or about May 13, 1983, Biffle executed and delivered to Victor Federal a written guaranty agreement whereby he unconditionally guaranteed payment of 20% of the original loan of $214,200 plus closing costs estimated to be $5,000.

6. On or about January 14, 1985, Hope became a partner in Sooner Vista Partnership and, for good and valuable consideration, executed and delivered to Victor Federal a guaranty agreement whereby he unconditionally guaranteed payment of 10% of the original loan of $214,200 plus closing costs estimated to be $5,000.

7. On or about March 13, 1985, Biffle executed and delivered to Victor Federal a renewal promissory note (the "Renewal Note") which incorporated the balance of Sooner Vista Partnership's indebtedness under the Note plus closing costs and accrued interest.

8. Upon receipt of the Renewal Note, Victor Federal did not mark the Note paid or return the Note to Sooner Vista Partnership or otherwise release Sooner Vista Partnership from liability under the Note.

9. On March 13, 1987, the Federal Home Loan Bank Board ("FHLBB") appointed the FSLIC as receiver for Victor Federal and on that same date the FHLBB chartered Victor and substantially all assets of Victor Federal, including the Note, mortgage, guaranty agreements and Renewal Note described above were transferred to Victor.

10. On July 28, 1988, the FHLBB appointed the FSLIC as receiver for Victor and, as receiver, the FSLIC succeeds to all rights, titles, interests and privileges of Victor.

11, That on or about July 25, 1985, Hammons was released from liability under his guaranty agreement by Victor Federal, but neither Sooner Vista Partnership, Barnett, Biffle, Helton, Little, Miller, Snoddy, Wynn nor Hope were released from liability by Victor Federal or Victor.

12. That the Note, Renewal Note and guaranty agreements are in default and, despite demand, Sooner Vista Partnership, Barnett, Biffle, Helton, Hirzel, Little, Miller, Snoddy, Wynn and Hope have failed to pay the amounts outstanding under the Note or Renewal Note pursuant to the terms and conditions of said instruments and the following amounts are now outstanding pursuant to said instruments:

Principal	$228,205.04
Interest through November 18, 1988	$ 60,752.46
Interest from November 19, 1988 until paid	$ 49.92 per diem
Late Charges through November 18, 1988	$ 3,422.40
Abstracting and Maintenance Expenses	$ 1,962.43

13. That the Defendants Biffle, Barnett, Helton, Hirzel, Little, Miller, Snoddy, Wynn and Hope are estopped pursuant to *D'Oench Duhme & Company v. FDIC*, 315 U.S. 447 (1942) and its progeny, from asserting that they have had their liability limited or that they have been released from liability under the Note, the Renewal Note or their respective guarantees. The other defenses raised by Hope (i.e., lack of acknowledgement on the guaranty, change in the underlying obligation and recission of partnership interest) fail as a matter of law.

14. That the FSLIC as receiver for Victor should be granted judgment *in personam* and *in rem* against Sooner

Vista Partnership, a partnership which, at the time the indebtedness was incurred, was composed of Hammons, Barnett, Biffle, Helton, Hirzel, Little, Miller, Snoddy and Wynn, for the sum set forth above together with all costs of this action including a reasonable attorney's fee of $20,000 and for all of which let execution issue against said partnership and, if the property of Sooner Vista Partnership be insufficient to satisfy the judgment, then let execution issue against the individuals composing said partnership, except Hammons, until said judgment is satisfied in full.

15. That the FSLIC as receiver for Victor should be granted judgment *in personam* and *in rem* against each Hope, Barnett, Biffle, Helton, Nirzel, Little, Miller, Snoddy and Wynn for 10% each of the original loan of $214,000 plus closing costs which totals $217,843.21 pursuant to the guaranty agreements executed by said parties.

16. That the FSLIC as receiver for Victor has a first lien on the real property described above and should be granted judgment *in rem* against all Defendants and parties named herein, foreclosing its superior mortgage in and to the real property described above.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this Court that the FSLIC in its capacity as receiver for Victor have and recover a judgment *in personam* and *in rem* against Sooner Vista Partnership for the principal sum of $228,205.04 plus accrued interest through November 18, 1988, of $60,752.46, together with continuing interest from November 19, 1988, until paid at the rate of $49.92 per diem, together with late charges of $3,422.40, plus all costs of this action including a reasonable attorney's fee of $20,000 and abstracting and maintenance expenses of $1,962.43.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that Mike Barnett, Jim Biffle, John R. Helton, Jeff L. Hirzel, James W. Little, Kenneth B. Miller, Phillip E. Snoddy and Marvin L. Wynn, as general partners of Sooner Vista Partnership, are jointly liable for the portion of the judgment entered herein against Sooner Vista Partnership which is not satisfied through the assets of said partnership.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that the FSLIC as receiver for Victor have and recover a judgment *in personam* against John Stephen Hope, Mike Barnett, John R. Helton, Jeff L. Hirzel, James W. Little, Kenneth B. Miller, Phillip E. Snoddy and Marvin L. Wynn, for a sum equal to 10% each of $217,843.21 and a judgment *in personam* against Jim Biffle for a sum equal to 20% of $217,843.21.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that the FSLIC as receiver for Victor has a valid first lien on the real property described above, securing the judgment entered herein in the principal sum of $228,205.04 plus interest, costs and attorney's fee as set forth above, which is prior to the rights, titles, interests and liens of all Defendants and parties herein and, therefore, is entitled to a judgment *in rem* against all Defendants foreclosing said first lien.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that the rights, titles, interests and liens of all parties herein be foreclosed upon the real property described above and, upon a praecipe being filed, that a special execution and order of sale shall be issued by the Clerk of this Court, directing the Sheriff of Delaware County, Oklahoma to levy upon, advertise and sell the above described real property after due and legal appraise-

ment, and to pay the proceeds of such sale to the Clerk of this Court for application and distribution as hereinafter set out.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that the order of priority of liens of the parties and the order of the distribution of proceeds of the sale are as follows: (a) first to the payment of delinquent ad valorem taxes due the County Treasurer of Delaware County, Oklahoma; (b) second to the payment of all costs and attorney fees incurred herein by Victor or the FSLIC as receiver for Victor; (c) third to the payment of the judgment lien of the FSLIC as receiver for Victor in the sum of $228,205.04 plus accrued and accruing interest; (d) fourth the balance, if any, to be paid to the Clerk of this Court to await the further order of this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that, upon confirmation of the sale of the above described real property, each and every party herein shall be forever barred, foreclosed and enjoined from asserting their claim in any right, title, interest estate or equity redemption in and to said premises or any part thereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that, upon confirmation of the said sale, the Sheriff of Delaware County, Oklahoma shall execute and deliver a good and sufficient deed to the premises to the purchasor thereof, conveying all right, title, interest estate and equity redemption of each of the parties herein and each and all parties claiming under them since the filing of the Petition in this suit, and in and to the real estate described above and that upon application of the purchaser, the Clerk of this Court shall issue a writ of assistance to the Sheriff of Delaware County, Oklahoma

who shall thereupon and forthwith place said premises in full and complete possession and enjoyment of said purchaser.

/s/ Sam C. Fullerton
Judge of the District Court

Delaware County, Oklahoma, this 17th day of January, 1990
by /s/Dana J. Crouch - Deputy

Judy E. Larmon
Court Clerk

ITEM 10

CERTIFICATE OF RECORD ON APPEAL

FILED
5-21-90

State of Oklahoma)
County of Delaware) ss CERTIFICATE

I, Judy E. Larmon, Court Clerk, State of Oklahoma, do hereby certify that the above and foregoing is a full, true, correct and complete record, and contains all of the pleadings, motions orders, journal entries, instructions and all pleadings designated to be included in the Record on Appeal in Case No. C-85-371 styled *Victor Federal Savings & Loan Assn.* VS *Jim H. Biffle, et al*

That the pleadings are the original pleadings as filed in my office in said case, and are as set out in the Index hereto attached, and the same are the original pleadings as filed on the dates set forth in the filing stamps attached thereto, and as set forth in the index and attached hereto.

Witness my hand this 21st day of May 1990.

JUDY E. LARMON, Court Clerk

/s/ DAna J. Crouch
deputy